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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. [redacted] 19

NEPTUNE METER COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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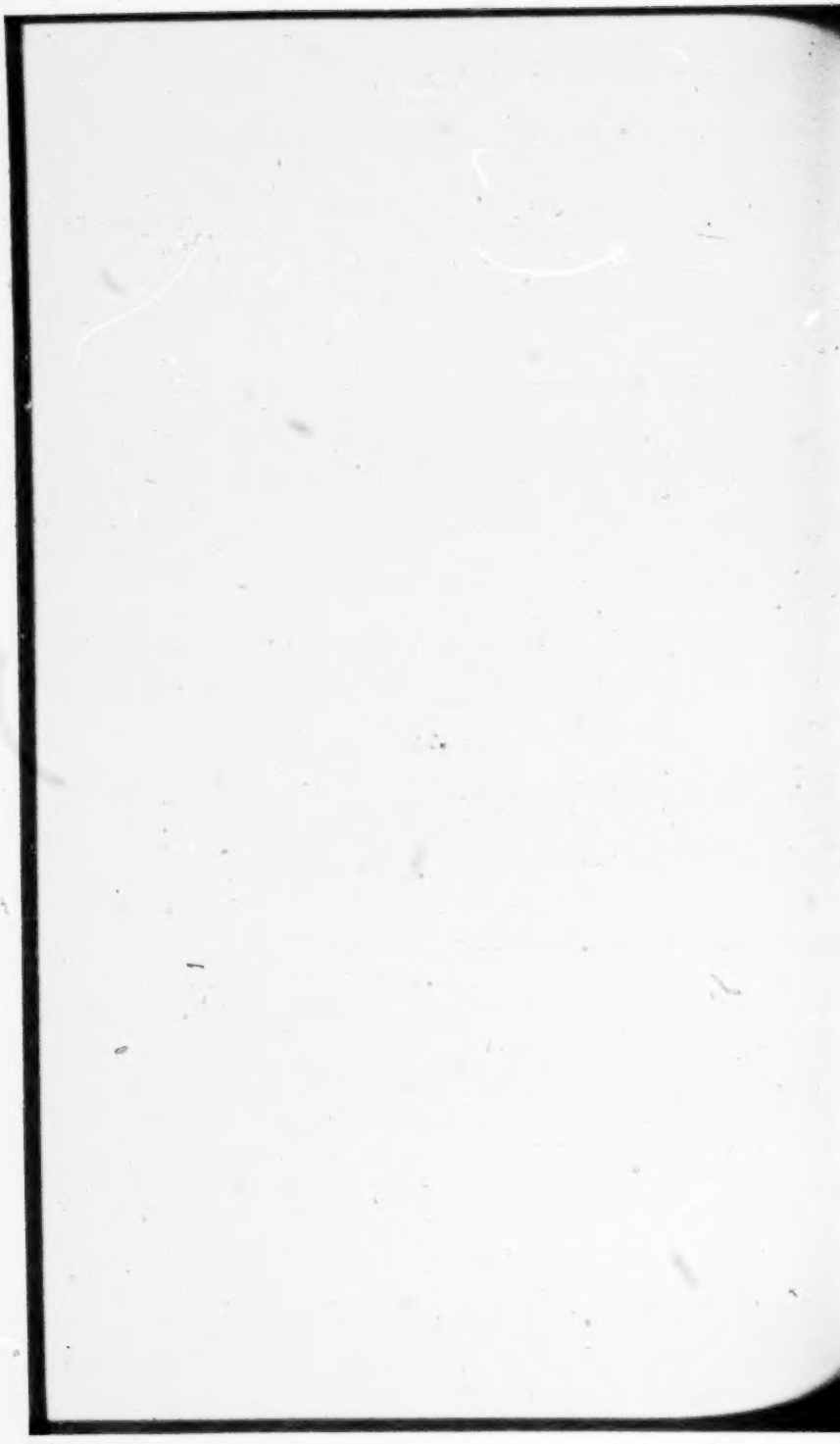

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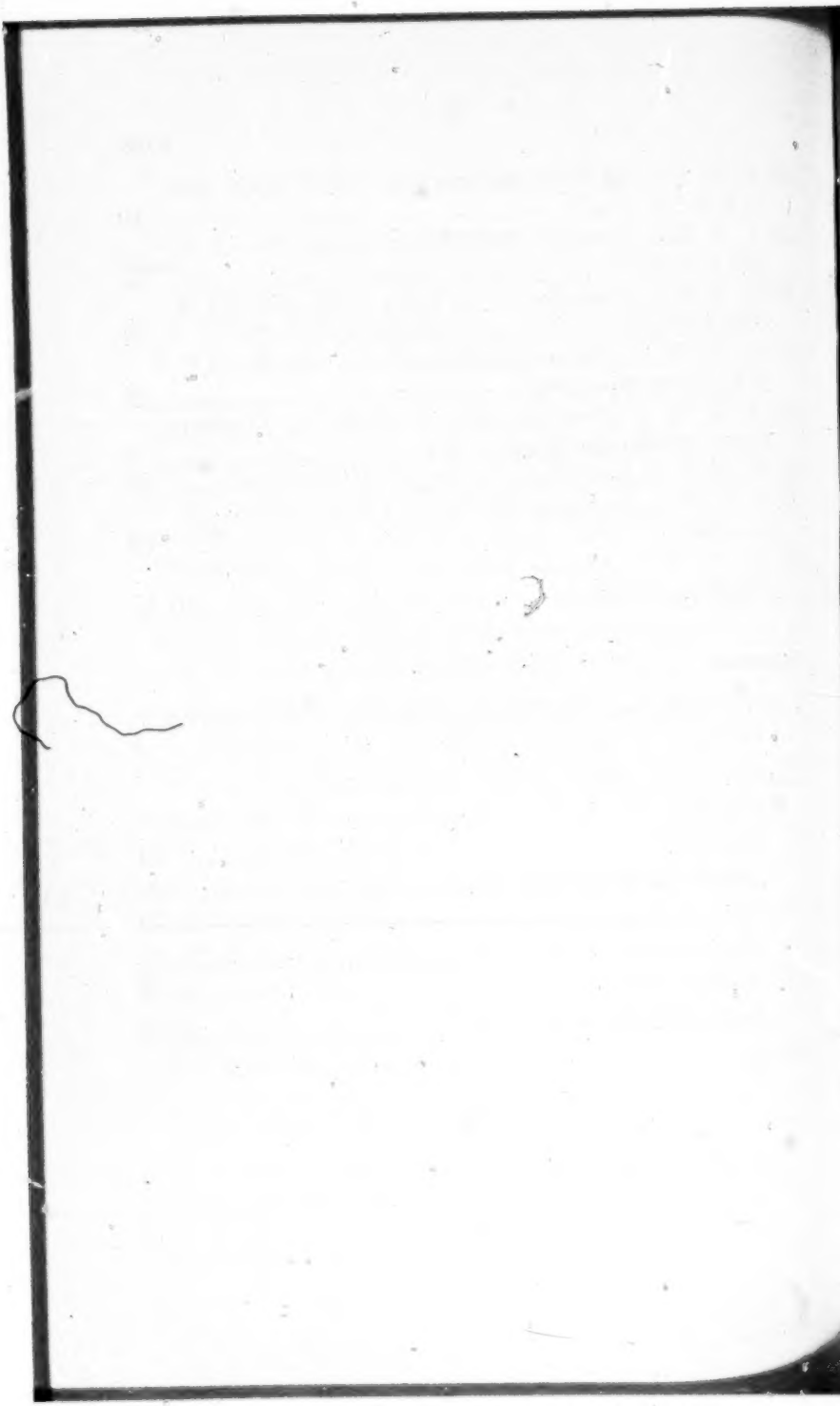

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NEPTUNE METER COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Neptune Meter Company, respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on December 20, 1946 modifying and, as modified, enforcing an order of the National Labor Relations Board dated March 6, 1946.

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 753-773) has not, as yet, been officially reported. The findings of fact, conclusions of law and

order (R. 670-700) of the National Labor Relations Board (hereinafter referred to as the "Board") are reported in 66 N. L. R. B. 292.

Jurisdiction

The decree of the Circuit Court of Appeals sought to be reviewed was entered on December 20, 1946 (R. 774-776). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (43 Stat. 938, 28 U. S. C. Sec. 347(a)) and Section 10(e) and (f) of the National Labor Relations Act (49 Stat. 454, 29 U. S. C. Sec. 160(e) and (f)).

Statute Involved

The statute involved is the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*, hereinafter referred to as the "Act"). The pertinent provisions of the Act are set forth in the appendix to the accompanying brief.

Statement of the Case

The Circuit Court of Appeals for the Second Circuit by a divided court has affirmed an order of the Board finding that petitioner had violated the Act by dominating a labor organization known as Independent Employees Association (hereinafter referred to as IEA) and ordering petitioner to "disestablish" the IEA and not to recognize or deal in the future with any labor organization as the representative of its employees unless and until such organization is certified by the Board. The Board's complaint in this proceeding was issued on March 22, 1945 and hearings were held before a Trial Examiner during April 1945. The IEA was permitted to intervene and presented evidence and ar-

guments in opposition to the contentions of the Board. The material facts on which the Board's order was based may be summarized briefly as follows:

Beginning in 1919 and prior to the passage of the Act the Company participated with its employees in an organization known as the "Congress" which dealt with questions of wages and working conditions. Upon passage of the Act in 1935 the Company immediately disbanded the Congress, and notified its employees of this fact and of their rights under the Act to select a labor organization of their own choosing.

The employees thereafter formed Employees Representative Organization (hereinafter referred to as "ERO") which bargained collectively with management for approximately nine years. During this period the Company without discrimination allowed representatives of the ERO to use company premises and other facilities and permitted such employees to receive their regular pay during the time spent in attending meetings or otherwise conducting the business of the ERO. Because of these facts and the circumstance that ERO followed the "Congress" the Board in or about June 1944 brought proceedings to disestablish ERO.

During the course of the Board's hearings on the ERO in July 1944 various employees who attended reached the conclusion that the ERO or a reorganization of ERO would not satisfy the Board and decided to form an entirely new organization (R. 224-225, 227-228, 232, 244). These employees, who had been representatives in the ERO (R. 246), thereupon enlisted the aid of other employees and began soliciting initiation fees and applications for member-

ship in what they advised was to be a "brand new organization" (R. 229-233). The organizers for the new union, which became known as the IEA, engaged the services of an attorney and at a mass meeting of employees held on August 30, 1944, attended by a very large majority of the employees, elected temporary officers (R. 234, 295-296; Board's Exhibit 8, R. 517-522). A Constitution and By-Laws were adopted at a subsequent mass meeting held on October 4, 1944 (R. 304; Board's Exhibit 8, R. 523-524).

Meanwhile, on September 6, 1944, the Board's Trial Examiner handed down his intermediate report recommending disestablishment of the ERO (Board's Exhibit 2, R. 474-493). On September 21, 1944 the Company complied with such recommendation, withdrew recognition from the ERO and posted throughout its plant notices of disestablishment in the form recommended by the Trial Examiner (Respondent's Exhibit 1, R. 607-608).

The IEA, claiming to represent a majority of the employees, made its first demand upon the Company for recognition on September 7, 1944 (R. 401), and this demand was rejected by the Company (R. 309-310, 402). When the Company's refusal to recognize IEA was communicated to its members at the mass meeting on October 4th strenuous disapproval was registered by the employees present (R. 312), who insisted upon immediate recognition by the Company (R. 523-524). A walkout, the first in the history of the Company, followed (R. 393), and the representatives of the IEA were sent back with instructions to force the issue with management (R. 392-393).

On October 6, 1944 a representative of a union affiliated with the American Federation of Labor called on the management claiming to represent certain workers in

the foundry of the Company's plant and asking for recognition of his union (R. 201-203). His claim was similarly rejected by the Company, and he did not press the issue further with the Company (R. 203).

The IEA, however, did press the issue, demanding recognition again and threatening another work stoppage (R. 278-280, 392, 404), and after a long and stormy session with management on October 12, 1944 agreement was obtained that the Company would recognize IEA if it could prove that it represented a majority of the Company's employees (R. 392, 404-405). Recognition was granted two days later after a check of IEA membership cards against the signatures on the payrolls showed a representation by IEA of over 600 employees out of a total of approximately 725 eligible employees (R. 316-317, 394-395).

The final organization of IEA was not completed until December, 1944, at which time permanent officers were elected (R. 184-186). This was approximately 2½ months after the first notices disestablishing ERO were posted. The Constitution and By-Laws had not been adopted until October 4, 1944 (R. 304; Board's Exhibit 8, R. 523-524), about 2 weeks after the posting of the disestablishment notices.

In addition to the foregoing facts bearing on the organization and recognition of IEA, the record showed that the Company took no part in the formation of IEA and contributed no financial or other support to it (R. 147, 235, 353-354, 397), nor did Company supervisors or officers at any time participate in or give encouragement to IEA (R. 147, 234, 296-297, 398-399). The evidence wholly failed to show any actions or statements by the Company hostile to other unions or any instance of discrimination

against members of other unions, but it affirmatively appeared that a union affiliated with the CIO freely carried on an active organizational campaign throughout this period (R. 399-401, 718-719). The desire of a large majority of the employees to be represented by IEA and their vigorous insistence that the Company must deal with IEA was repeatedly manifested (R. 245, 94, 126, 234, 392-393, 523-524, 350-351, 710-711, 718, 720).

Further important facts found by the Board were set forth in the Trial Examiner's report as follows (R. 695):

> "* * * the undersigned further finds that the IEA as an organization differs structurally from the ERO in that the constitution and by-laws of the former provide, *inter alia*, for regular meetings of the general membership, membership dues and initiation fees, and autonomy in the election of officers and further conduct of its business as a labor organization. Officers chosen, with few exceptions, have not been prominently identified with the prior company dominated organizations. Beginning with the organizational meeting of August 30, 1944, all of its meetings appear to have been held away from Respondent's premises and outside of working hours. No supervisors or officers of the Respondent have participated therein. The contract executed by the IEA and the Respondent on January 1, 1945, appears to have been agreed upon after several bargaining conferences and incorporates certain benefits not previously enjoyed by the employees. Standing alone, it would not seriously challenge the legitimacy of the organization. In short, it appears that the IEA has made a consistent effort to divest itself of the indicia of company domination (R. 695)."

Upon the foregoing facts the Board found that the Company was dominating and interfering with and con-

tributing support to the IEA in violation of Section 8(1) and (2) of the Act (R. 697-698), and by the order now under review the Board directed the Company to "disestablish" the IEA and prohibited the Company from bargaining or dealing with any labor organization representing its employees unless and until such organization was certified by the Board (R. 673-675).

Following issuance of the Board's order on March 6, 1946 the IEA served notice upon the Company that approximately 700 of the Company's employees had unanimously resolved at a meeting to resist the Board's order and that the IEA intended to contest the order in the courts and demanded its continued recognition by the Company (R. 710-711). A motion was then made by the Company for a stay of the order, and this was denied by the Board by its order of March 22, 1946 (R. 723). A motion by the IEA to reopen the proceedings before the Board or for an election or clarification of the Board's order was denied by an order of the Board dated March 29, 1946 (R. 726).

The Company petitioned the court below to review and set aside the Board's order on May 6, 1946, following the filing of a similar petition by the IEA. The Board answered and filed a cross petition for enforcement of its order. The court dismissed the petitions for review and entered its decree (R. 774-776) enforcing, with a slight modification in language, the order of the Board.

The Questions Presented

1. Whether, in the absence of any evidence of interference by the employer or its supervisors in the organization of an independent union and of any history of hostility

toward or discrimination against nationally affiliated unions, and where the great majority of the employees have affirmatively shown their desire for an independent union; the independent union differs structurally from a former union found to be company-dominated; its temporary president and vice-president, and all of its permanent officers were neither officers of nor prominently identified with the prior union; and its meetings have been held away from the company's premises and outside of working hours, the court below erred in permitting the Board to conclude that the independent union was also company-dominated from the circumstances that employees who had been prominent in the former union took a leading part during the formative stages of the independent union, but not thereafter, and that the preliminary organization of the independent union occurred before the disestablishment of the former union.

2. Whether, in the light of the record, the court below erred in holding that there was substantial support in the evidence for the Board's finding that petitioner had violated Section 8 (1) and (2) of the Act by dominating, interfering with and contributing support to the IEA.

3. Whether the court below has incorrectly interpreted the decisions of this Court dealing with the question of "successor unions" by considering that a decision of the Board on this question is for all practical purposes not open to review by the courts.

4. Whether the court below erred in failing to set aside the order of the Board as beyond the power and authority of the Board under the Act in that (a) the requirement that petitioner "disestablish" the union desired by the majority of its employees would not, upon the facts in

this record, effectuate the policies of the Act but would defeat such policies, and (b) the requirement that petitioner shall not recognize or deal with any labor organization as representative of its employees until and unless certified by the Board is unauthorized and in contravention of the principles of the Act.

Specification of Errors to be Urged

The Circuit Court of Appeals in affirming the order of the Board erred in its rulings on each and all of the foregoing questions.

Reasons for Granting the Writ

Like the case of *N. L. R. B.* v. *Keystone Steel & Wire Co.* now awaiting argument in this Court (October Term, 1946, Docket No. 544), this case presents for determination a conflict of authority between the court below and other Circuit Courts of Appeals. The existence of this conflict was recognized and urged upon this Court in the Solicitor General's petition for the writ of certiorari which was granted on November 12, 1946 (see *Keystone* petition, p. 14). The decision of the Seventh Circuit in the *Keystone* case was represented by the Solicitor General as being in conflict with earlier decisions of the Second Circuit, which in turn were relied upon by a majority of that court in deciding the case at bar. (See R. 764-765; *Keystone* petition, pp. 14-17).

In the case at bar the Second Circuit, as did the Seventh Circuit in the *Keystone* case, had before it an unaffiliated union which had been conceived and organized by employees without company interference. In each of the two cases a

previously existing union, found by the Board to have been company-dominated, had been voluntarily dissolved. In each case the Board concluded that the subsequently organized independent union was a "successor" to the earlier company-dominated union and therefore that it, too, was company-dominated.

In the *Keystone* case (155 F(2d) 553), the Board's conclusion was reversed by a divided court, the majority saying (at p. 558): "The Board further found that at the same time the members of KEA [the earlier company-dominated union] decided to abandon it, they also decided to establish Alliance, another unaffiliated union. This, of course, is a violation of no statute. *E. I. du Pont de Nemours & Co.* v. *N. L. R. B.*, 4 Cir., 116 F. 2d 388, certiorari denied 313 U. S. 571, 61 S. Ct. 959, 85 L. Ed. 1529; *De Bardeleben* v. *N. L. R. B.*, 5 Cir., 135 F. 2d 13." In the case at bar a divided court affirmed the conclusion of the Board and relied upon the following language from one of its earlier decisions* (R. 765): "* * * certainly when the sequence is not broken by a substantial period, marked at the outset by an outright repudiation of whatever has gone before, we shall regard the matter as not open to review unless the Supreme Court advises us to the contrary".

Other similarities in fact and conflicts as to the law between the case at bar and the *Keystone* and other Seventh Circuit decisions will be discussed in the accompanying brief. We shall also show there that holdings of the Fifth and Ninth Circuits are in accord with the Seventh Circuit and in conflict with the holding in the court below.

N. L. R. B. v. *Standard Oil Co.*, 138 F (2d) 885.

In addition, the Circuit Court of Appeals for the Second Circuit has gone so far in holding that the conclusion by the Board that an employer is dominating a "successor" union is for all practical purposes not open to review at all (R. 772), that it is not only in conflict with the other Circuit Courts referred to above but has, we believe, misinterpreted the decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The inappropriateness of the Board's order requiring a "disestablishment" on the facts of this case presents an important question as to the scope of the Board's power under Section 10(c) of the Act. More important, the provision of the Board's order, affirmed by the court below, prohibiting petitioner and its employees from engaging in any of the rights of collective bargaining except through a union which has received the prior certification and approval of the Board, presents a novel and important question in the administration of the National Labor Relations Act which should be passed upon by this Court.

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, it is respectfully submitted that this petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be granted.

NEPTUNE METER COMPANY,
Petitioner.

By EDWARD L. COFFEY,
Counsel for Petitioner.

January 17, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NEPTUNE METER COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

THE DECISION OF THE COURT BELOW IS DIRECTLY IN CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN *KEYSTONE STEEL & WIRE CORP.* v. *N.L.R.B.*, 155 F. (2d) 553, NOW AWAITING ARGUMENT IN THIS COURT (OCTOBER TERM 1946, DOCKET 544) AND WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The conflict between the circuits is illustrated by the case of *Keystone Steel & Wire Co.* v. *N. L. R. B.*, 155 F. (2d) 553 (1946), certiorari granted by this Court November 12, 1946, where the Circuit Court of Appeals for the Seventh Circuit held there was no substantial evidence that a "successor" union was company-dominated. The court so held despite evidence relied upon by the Board showing

that officers in a former company-dominated union took a leading part in its formation, that the independent union was quickly formed and promptly recognized by the company without verification of its claim to a majority, that the independent succeeded to the treasury of the company-dominated union and adopted a similar constitution, that the company never posted notices disestablishing the old union or announced to its employees at large that it would respect their rights to select a union of their own choosing, that company supervisors expressed hostility to other unions and various supervisory employees joined the independent, and that the company discriminated against other unions in applying its rule against solicitation on company time. The Court of Appeals for the Seventh Circuit held that such facts do not support the inference that the independent was a successor to the former union "in any material and substantial respect."

More specifically, the court also held (p. 558):

> "The fact that the former officers of K. E. A. took the leading part in the formation of Alliance and eventually became its officers is of no importance in determining the question of domination."

The Seventh Circuit had previously rejected a similar inference of the Board in *Foote Bros. Gear & Machine Corp.* v. *N.L.R.B.*, 114 F. (2d) 611, 619 (1940), remanded 311 U. S. 620 (1940), reaffirmed 121 F. (2d) 802 (1941):

> "Egner's active participation in the affairs of the Independent is cited by the Board as evidence that the former was merely a continuation of the representative plan because Egner had formerly been a leader of it. Such a conclusion is unwarranted. It is natural for a man who is active in union affairs

> to continue such activities because of his liking for them. The end of the representation plan did not change Egner's personality, his ability, or his views."

In contrast with this approach, the majority opinion in the case at bar contains the following (R. 763):

> "On the basis of inferences from these facts thus found, the Board further found, in effect, as follows: The fact that the company failed to disestablish E. R. O. before the formation of I. E. A. and the fact that I. E. A. was initiated and sponsored by a group of E. R. O. officers and representatives suggested to the employees a substantial identity between I. E. A. and E. R. O.; the employees therefore would reasonably conclude that the company approved I. E. A. as it had E. R. O. and the Congress, so that the employees' choice of I. E. A. was 'not as free as the statute demands.'"

The decision below is also in direct conflict with other holdings of the Seventh Circuit.[1]

The Fifth Circuit Court of Appeals, in dealing with the question of successor unions, is also in conflict with the Second Circuit. This is evidenced by the Fifth Circuit's refusal to enforce the Board's order disestablishing a successor union in *Humble Oil & Refining Co.* v. *N.L.R.B.*, 113 F. 2d 85 (1940) on facts very similar to those in the case at bar.

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[1] *A. E. Staley Manufacturing Co.* v. *N.L.R.B.*, 117 F. (2d) 868 (CCA 7th, 1941);
N.L.R.B. v. *Duncan Foundry & Machine Works, Inc.*, 142 F. (2d) 594 (CCA 7th, 1944);
Commonwealth Edison Co. v. *N.L.R.B.*, 135 F. (2d) 891 (CCA 7th, 1943);
N.L.R.B. v. *Gutmann & Co.*, 121 F. (2d) 756 (CCA 7th. 1941);

In that case, the Court stated in commenting on the activities of the leaders of the old organization in the formation of the new (at p. 92),

> "The Board lays some stress on the fact that Thomas, who first set to work on the Baytown constitution, had been a secretary of the employees' representatives under the Joint Conference plan and had been a leader in the Security League drive against the union. He was a man of college education and well qualified to lead. He was an employee without any supervisory authority. We see nothing either in his familiarity with the old plan or in his pronounced opposition to the union which would disqualify him to lead in the new organization."

Other decisions of the Fifth Circuit in the field of successor unions are also in conflict with the Second Circuit,[2] and the only reported decision in the Ninth Circuit dealing with the question also shows a conflict with the decisions in the Second Circuit Court of Appeals.[3]

The error of the court below in sustaining an order of the Board based upon facts which courts of other circuits have held do not constitute substantial evidence, calls for the exercise of this Court's powers of review.

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[2] *Magnolia Petroleum Co.* v. *N.L.R.B.*, 112 F. (2d) 545 (CCA 5th, 1940);
N.L.R.B. v. *El Paso Electric Co.*, 133 F. (2d) 168 (CCA 5th, 1943).

[3] *N.L.R.B.* v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815 (CCA 9th, 1942).

II

THE RULING OF THE COURT BELOW THAT THE DECISION OF THE BOARD ON THE "SUCCESSOR UNION" ISSUE IS FOR ALL PRACTICAL PURPOSES NON-REVIEWABLE WAS BASED ON AN ERRONEOUS INTERPRETATION OF THE HOLDINGS OF THIS COURT.

The question of substantial evidence is of particular importance in this case in view of the position taken by the Circuit Court of Appeals for the Second Circuit that findings of the Board as to illegal "successorship" are not open to review by the courts. Its decision can be explained only by the extraordinary limitation imposed by it upon its own powers of review. In its opinion, the court followed and applied its former decision in the case of *N. L. R. B.* v. *Standard Oil Co.*, 138 F. (2d) 885 (CCA 2nd, 1943) and, quoting from its opinion in that case, stated (R. 765):

> "* * * 'We understand the law to be that the decision of the Board upon that issue is for all practical purposes not open to us at all; certainly not after we have once decided that there was "substantial" evidence that the "disestablished" union was immediately preceded by a period during which there was a "dominated" union * * * and certainly when the sequence is not broken by a substantial period, marked at the outset by an outright repudiation of whatever has gone before, we shall regard the matter as not open to review unless the Supreme Court advises us to the contrary.' We know of no subsequent Supreme Court decision which so advises us."

This holding is based, we submit, upon a misunderstanding of the law as laid down in the decisions of this Court.

It has perpetuated an error which deprives petitioner of a fair judicial review and which should be reviewed and corrected by this Court. By having held that the issue of "successorship" in this case is "not open to review", the court below appears to have departed from the rule of substantial evidence which requires, as this Court has stated, that there be evidence "affording a substantial basis of fact from which the fact in issue can be reasonably inferred". *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299 (1939).

By excessively limiting its powers of review the court below has reached a result wholly unjustified under the decisions of this Court. This Court has indicated the factors which will "lend credibility" to an inference of company domination in a successor union case. Such factors are the failure of the employer to disestablish a former company-dominated union, acts by the employer displaying hostility or discriminations against other unions, or participation or influence exerted by foremen or supervisors in the organization of an independent union—all of which facts this Court has held may "make tenable" an inference by the Board that the employer has interfered with the free choice of his employees in the selection of a labor organization. See *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72 (1940); *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584 (1941); *N. L. R. B.* v. *Southern Bell Tel. & Tel. Co.*, 319 U. S. 50 (1943).

In the present case such elements are entirely lacking. Petitioner's record is free from anti-union bias. Its officers, foremen and supervisors have taken no action, directly or indirectly, to assist the organizing activities of the IEA or to oppose those of any rival union. Petitioner

has formally withdrawn recognition and posted notices disestablishing a former organization in the very manner directed by the Board (R. 388-389, 395-396). The absence in this case of such factors as might lend credibility to a finding of company domination is an indication of the extent to which the court below has misinterpreted the decisions of this Court.

In this respect, as Judge Swan points out in his dissenting opinion below (R. 772), the Circuit Court of Appeals has gone much further than have other circuit courts. Courts in other circuits have not considered that they are bound, for all practical purposes, to accept the Board's inference that an employee is dominating a so-called successor union but on the contrary have conceived that their duty as reviewing courts under the statute requires a careful review of the evidence and an independent determination whether the Board's inferences and conclusions are reasonable and fair. Thus, the Circuit Court of Appeals for the Fifth Circuit in setting aside the Board's finding of company-domination of an alleged "successor union", has stated:

> "When then, as here, the Board applies to this court for enforcement of its order, and there is a substantial challenge of the findings and order as unsupported by evidence, it is the duty of this court to examine the evidence for itself, not, of course, to determine what fact inferences it, acting as a trier, would have drawn, what fact findings it would have made, but to determine whether reasonable minds having no interest as accuser or otherwise in the result, but wholly impartial, could, upon the evidence, have legally and fairly drawn the fact inferences, made the fact findings. And, when, it is clear

> as here, that the material evidence, is entirely without dispute; that no witness denies a fact to which another testifies; that in short, the findings are based, not upon conflicting but upon non-conflicting evidence, our determination as to whether the Board's findings must stand or fall must not rest upon whether the Board deems that the inferences it drew are supported by substantial evidence. It must rest upon whether measured by the settled rules governing the review of jury verdicts, it is the opinion of this court that the undisputed facts are in law capable of fairly giving rise to the fact inferences the Board has drawn." *Magnolia Petroleum Co.* v. *N. L. R. B.*, 112 F. (2d) 545, 549 (1940).

To the same effect, see *Foote Bros. Gear & Machine Corp.* v. *N. L. R. B., supra,* at page 621.

It is a question of utmost importance to employers and employees affected by the National Labor Relations Act that the existing conflict between the circuits in "successorship" cases should be determined and that the proper powers of review by the courts should be clarified and affirmed by this Court.

III

WHETHER THE BOARD HAS POWER TO MAKE AN ORDER WHICH, IN EFFECT, PROHIBITS PETITIONER FROM BARGAINING WITH ANY BUT A NATIONALLY AFFILIATED UNION ALTHOUGH ITS EMPLOYEES PREFER TO BE REPRESENTED BY AN INDEPENDENT UNION PRESENTS A QUESTION OF IMPORTANCE IN THE ADMINISTRATION OF THE ACT.

Enforcement of the Board's order in this case amounts to a permanent injunction requiring petitioner to refuse all

recognition to an independent union selected by the large majority of its employees and recognized by petitioner only after the vigorous insistence of its employees, enforced by a walkout and threat of a further walkout in its plant. The order further requires petitioner to refuse to deal with any labor organization representing its employees unless certified by the Board.

It is apparent that compliance with the decree can be achieved only at the cost of a serious conflict with the wishes of petitioner's employees, resulting in probable industrial strife and an interference with the employees' freedom of choice, which is opposed to the basic purposes of the National Labor Relations Act. There is serious doubt whether an order suspending all collective bargaining between an employer and his employees can be imposed under a statute designed to protect the right to bargain collectively. In short, as Judge Swan states in his dissenting opinion below (R. 773), "the 'remedy' applied destroys the very right which it purports to preserve, namely, the right 'to bargain collectively through representatives of their own choosing'." Furthermore, this order will, contrary to the policies of the Act, inexorably drive petitioners' employees into a nationally affiliated union in order to resolve their dilemma. For, as Judge Swan pointed out (R. 773), "The provision in the order of March 6th forbidding recognition of any union until it shall be certified by the Board will necessarily result either in compelling the employees to join a union affiliated with C. I. O. or A. F. of L., or in leaving them without a collective bargaining representative for an indefinite period of time, * * *". (See *N. L. R. B.* v. *Donnelly Garment Co.*, October Term 1946,

Docket Nos. 38-39, now awaiting decision by this Court; and see R. 348-351).

The power of the Board to make affirmative orders under Section 10(c) of the Act extends only to measures which will "effectuate the policies" of the Act. In enforcing the Board's order in this case the court below has, we believe, failed to heed the admonition of this Court that the Board is without power to impose a penalty or to select a remedy which is arbitrary and unreasonable.

N. L. R. B. v. *Fansteel Metalurgical Corp.*, 306 U. S. 240 (1939);

Consolidated Edison Co. v. *N. L. R. B.*, 305 U. S. 197 (1938).

In no previous case, to our knowledge, has the Board imposed such broad and sweeping requirements. The power of the Board so to act presents a novel and important question which should be passed upon by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. COFFEY,
Counsel for Petitioner.

APPENDIX

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 USC§ 151, et seq.) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the emloyees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the

right at any time to present grievances to their employer.

* * * * * * * *

Sec. 10. (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 305 19

NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

No. 306 20

NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

No. 317 22

INDEPENDENT EMPLOYEES' ASSOCIATION OF THE NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF NEPTUNE METER COMPANY

EDWARD L. COFFEY,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 905

NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

No. 906

NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

No. 917

INDEPENDENT EMPLOYEES' ASSOCIATION OF THE NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF NEPTUNE METER COMPANY

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

NEPTUNE METER COMPANY, Petitioner in Nos. 905 and 906, respectfully urges that writs of certiorari be granted in the above entitled cases for the following reasons:

1. The Memorandum of the National Labor Relations Board filed in this case admits the existence of a conflict between the Circuit Courts of Appeals which have dealt with the question of the conclusiveness of the Board's findings as to company-domination of successor unions.

2. Your Petitioner will undertake to file briefs in Nos. 905 and 906 within seven (7) days after the granting of writs of certiorari and will waive any requirement that the Solicitor General's briefs be filed a week prior to argument and will consent that the same be filed at any time prior to or after argument.

3. Petitioner will be prepared for oral argument in Nos. 905 and 906 concurrently with oral argument in *National Labor Relations Board* v. *Keystone Steel & Wire Company, et al.*, October Term, 1946, No. 544, which oral argument Petitioner presently understands will be held during the first week in March, 1947.

WHEREFORE, Petitioner respectfully urges this Court to grant writs of certiorari and to afford Petitioner an opportunity to be heard.

NEPTUNE METER COMPANY,
Petitioner.

By EDWARD L. COFFEY,
Counsel for Petitioner.

February 8, 1947.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 19

NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

No. 20

NEPTUNE METER COMPANY,

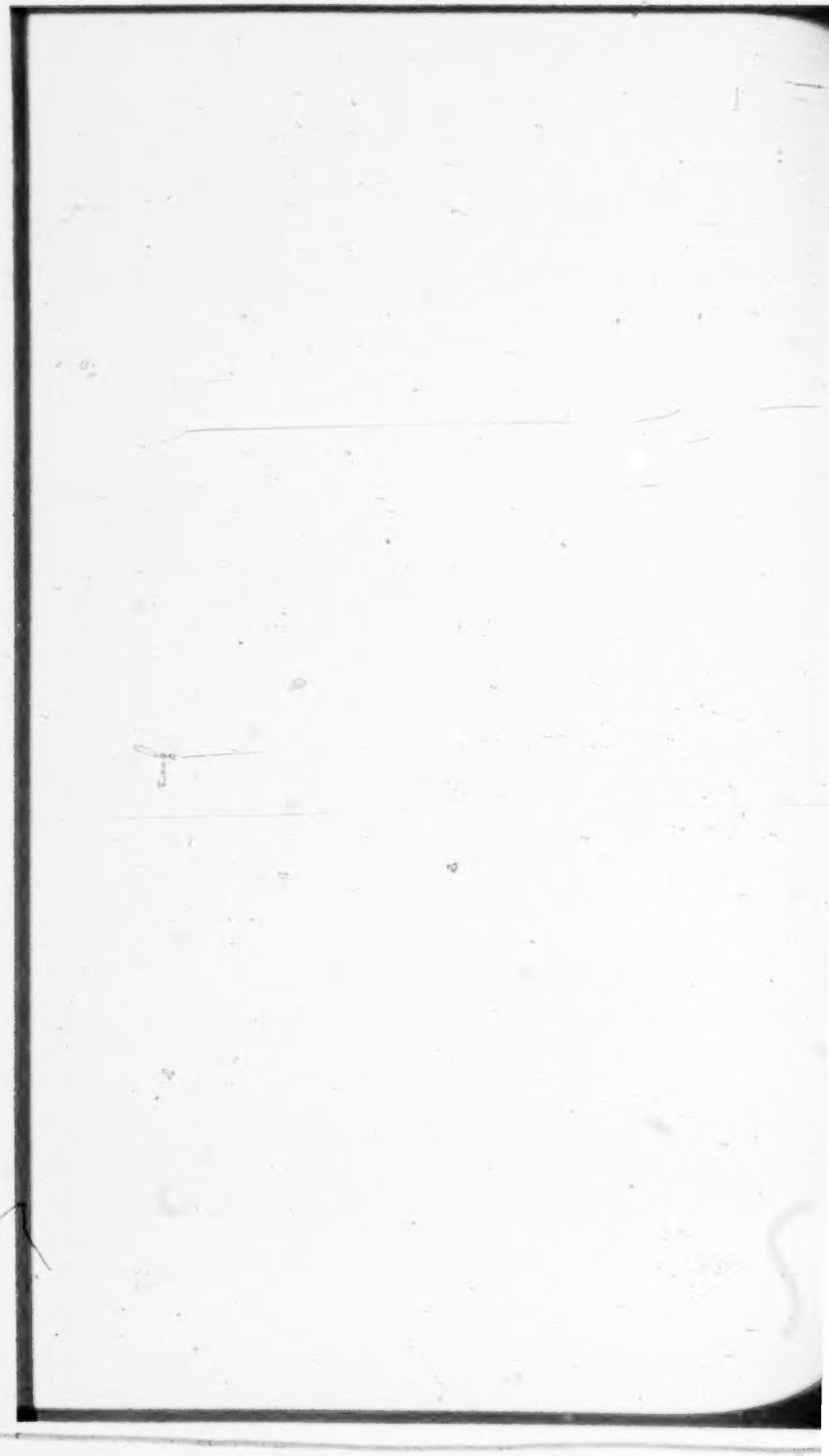
Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

EDWARD L. COFFEY,
Counsel for Petitioner.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 19

NEPTUNE METER COMPANY,

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No. 20

NEPTUNE METER COMPANY,

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NATIONAL LABOR RELATIONS BOARD.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

Petitioner, Neptune Meter Company, presents this Supplemental Brief in support of its Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit filed on January 17, 1947 and numbered 905 and 906 of the October Term, 1946. The Independent Employees Association of the Neptune Meter Company also filed a Petition for a Writ of Certiorari, formerly No. 917 of the October Term 1946, and now No. 22. The purpose of this Supplemental Brief is to bring to the attention of this Court the impact upon the issues involved of the amendments to the National Labor Rela-

tions Act (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*) effected by the enactment of the Labor—Management Relations Act, 1947 on June 23, 1947 (Public Law 101, 80th Cong., 1st Sess.). We will show in Point I *infra*, page 8, that this Court will give effect to changes in the law occurring while cases are pending on appeal, especially where no private rights are involved. The arguments presented herein are in addition to those advanced in the original brief.

POINT I

The orders of the National Labor Relations Board would not be issued by the Board, nor affirmed by the Circuit Courts, today.

The orders entered by the National Labor Relations Board (hereinafter called the "Board") in both cases now sought to be reviewed directed Petitioner to "completely disestablish" unions of its employees which the Board had found to be either "company-dominated", or a "successor" to a company dominated union. 58 NLRB 1240; 66 NLRB 292. Both orders were affirmed, with modifications not relevant here, by the Circuit Court of Appeals for the Second Circuit, with one judge dissenting, 158 F. 2d 448. The remedy of complete disestablishment was one which the Board, prior to the passage of the Labor—Management Relations Act of 1947, had reserved exclusively for unaffiliated unions. Under similar circumstances involving a union affiliated with one of the large international or national organizations, the Board would merely order the respondent company to cease giving effect to its contract with the particular union and to withdraw all recognition from it, but would withhold the drastic remedy of disestablishment. This was recognized by Mr. Paul Herzog,

the Chairman of the Board, who said in his prepared testimony before the Senate Committee on Labor and Public Welfare,

> "The Board, where it has found unions company dominated has accordingly used its power, as required by section 8(2) of the National Labor Relations Act, to disestablish such unions, for only by the disestablishment of company dominated unions can the employees begin to exercise a free and untrammeled choice of bargaining representatives.
>
> "It is true, as we pointed out in our earlier statement, that where the Board has found that an employer has assisted or coerced its employees to join a union affiliated with a national labor organization, it has not ordered the disestablishment of the local." (Hearings before the Committee on Labor and Public Welfare, United States Senate, 80th Cong., 1st Session, Vol. 4, p. 1912.)

An amendment to the law was aimed directly at correcting this practice of the Board. The following new sentence was inserted in old Section 10(c):

> "And provided further, That in determining whether a complaint shall issue alleging a violation of Section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope."

The committee and conference reports leave no doubt that this amendment was aimed directly at the former practice of the Board of ordering disestablishment of unaffiliated unions but not in the case of affiliated unions although

the evidence as to domination and support was identical. For example, the Conference Report states:

> "(9) To prevent discrimination by the Board to the disadvantage of independent unions and representation plans, the House bill and the Senate amendment both included in section 10(c) of the amended act, in substantially similar terms, a provision to the effect that no order of the Board should require or forbid any action by an employer with respect to any labor organization that in similar circumstances would not be required or forbidden with respect to a labor organization national or international in scope, or affiliated with such an organization. In the past the Board has made findings of violation of section 8(2) in cases involving independent unions, committees and representation plans upon much weaker evidence than it has required in cases involving affiliated unions, and it has ordered employers to take far more drastic action with respect to independent organizations than with respect to affiliated organizations. The conference agreement adopts the language of the Senate amendment, which requires equal treatment for both affiliated and nonaffiliated organizations. *The language of the Senate amendment and the conference agreement in this respect is directed at orders under section 8 (a) (1) and section 8 (a) (2).* This specification is not intended to imply that independent and affiliated unions can or should be treated differently under other provisions. Rather, the language covers the specific abuse which has come to the attention of Congress. It does not invite others." (House Report 510, 80th Cong., 1st Session, p. 54-55) (Emphasis supplied)

See also the views of the Senate Committee, Senate Report No. 105, 80th Cong., 1st Session, pages 12-13 under the heading "Equality of Treatment for Independent Unions" and at page 26, discussing amendments to Section 10(c). For the views of the House Committee, see House Report No. 245, 80th Cong., 1st Session, page 42, comment B under Section 10(c). The foregoing can leave no doubt that it was the intention of Congress to require the Board to adopt a uniform policy with respect to independent and affiliated unions, particularly in cases where company domination is alleged.

Under settled principles, this Court should leave the formulation of such new and uniform policy in the first instance to the considered reasoning of the Board, and accordingly should remand these cases to that agency for further proceedings not inconsistent with the National Labor Relations Act, as presently amended. Counsel is advised by counsel for the Keystone Steel & Wire Company that the Board and that Company have agreed to submit a stipulation in *NLRB* v. *Keystone Steel & Wire Co.*, No. 9 for the October Term, 1947, in this Court, which will call for an entry of an order by the Circuit Court of Appeals for the Seventh Circuit not requiring the disestablishment of the independent union involved in that case, although the Board had found it to be company dominated, 62 NLRB 683. The amazing similarity between the facts in the *Keystone* case and in the case at bar was pointed out in the Petition in No. 19, pages 9-10; 13-14.

POINT II

The scope of review by Circuit Courts of Appeals has been enlarged.

The question of the proper standard of review was raised in the Petition for a Writ of Certiorari and accompanying Brief filed on January 17, 1947 in Case No. 905, now No. 19 for the October Term, 1947, and it was there urged that even under the Act as it then existed, the Circuit Court had excessively limited the scope of its reviewing power, (Petition, No. 19, pp. 17-20). In view of the amendement to the National Labor Relations Act with respect to this very point the necessity for a review of the decision of the Court below, either by this Court or by the Circuit Court itself, becomes even more apparent. For example, the gravamen of the Circuit Court's opinion is found under the Court's heading, "This Court's Limited Authority," (R. 764-770).* Interspersed in its opinion, the Court said, "our statutory authority is severely restricted," (R. 764); " 'the decision of the Board upon that question is for all practical purposes not open to us at all,' " (R. 765) and "having in mind, then, our narrowly limited authority" (R. 770). In view of the foregoing, the effect of an enlargement in statutory authority should be considered by this Court, or, more properly, by the Court below.

The controlling language of Section 10(e) of the National Labor Relations Act, which formerly read "The findings of the Board as to the facts if supported by evidence shall be conclusive" now reads "The findings of the Board with

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* Inasmuch as the Circuit Court considered the cases together and wrote only one opinion, the references to its opinion are to the page numbers as they appear in the record in No. 19.

respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

That the above amendment was unequivocally intended to broaden the scope of review by a Circuit Court of Appeals is evidenced by the following statement from the Conference Report:

> "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and section 10(c) insures its deciding in accordance with the preponderance of the evidence. • • • This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—*will very materially broaden the scope of the court's reviewing power,*" (House Report 510, 80th Cong., 1st Session, p. 56) (Emphasis supplied.).

A question of this importance in the administration of the National Labor Relations Act should be passed upon in the first instance by the Circuit Court of Appeals.

POINT III

This Court will consider changes in the law occurring while cases are pending on appeal.

As long ago as 1801 Chief Justice Marshall, writing for this Court in *United States* v. *The Schooner Peggy*, 1 Cranch 102, said, at page 110,

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

This rule has been followed consistently by this Court. *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115 (1901); *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis* 224 U. S. 503 (1912); *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184 (1921); *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23 (1940); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 (1941); *Ziffrin, Inc.* v. *United States*, 318 U. S. 73 (1943). As recently as September 29, 1947, the Circuit Court of Appeals for the District of Columbia followed this general rule in setting aside an order of the Board in a case which had been argued prior to the enactment of the Labor-Management Relations Act, 1947 because of the

changes in the law effected by that statute. *L. A. Young Spring & Wire Corp.* v. *NLRB* (C. C. A., D. C., No. 9397). In addition, in proceedings before the Circuit Court of Appeals for the Seventh Circuit on the mandate of this Court in *NLRB* v. *E. C. Atkins & Company*, decided May 19, 1947, 331 U. S. 398, the Circuit Court on September 24, 1947 declined to enforce the Board's order, approved by this Court, because of changes in the law effected by the enactment of the Labor-Management Relations Act, 1947, subsequent to the decision of this Court, (order entered September 24, 1947; unreported).

This is particularly true where no private rights can be affected by the subsequent change in the law. This Court pointed out the distinction in *Hodges* v. *Snyder*, 261 U. S. 600, 603, (1923) where the Court said,

> "It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 429; *The Clinton Bridge*, 10 Wall. 454, 463; *United States* v. *Klein*, 13 Wall. 128, 146; *McCullough* v. *Virginia*, 172 U. S. 102, 124 (in which the repealing act was passed after judgment by the trial court).
>
> "This rule, however, as held in the Wheeling Bridge Case, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced;"

That the National Labor Relations Act creates no private rights is well settled by the decisions of this Court. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 (1940); *National Licorice Co.* v. *NLRB*, 309 U. S. 350 (1940).

CONCLUSION

In view of the amendments to the National Labor Relations Act noted above, it would be proper for this Court to grant writs of certiorari and upon such writs to remand these cases to the Circuit Court of Appeals for the Second Circuit for reconsideration, and determination of the effect to be given such amendments. However, inasmuch as the Board's orders themselves may well have a congenital infirmity by virtue of other amendments to the Act discussed under Point I, *supra*, page 2, it would seem more appropriate, and it is accordingly urged, that this Court order that the Circuit Court remand the cases to the Board in order that that agency may make the initial formulation of a uniform policy with respect to both affiliated and unaffiliated unions in situations involving charges of company domination.

Repectfully submitted,

EDWARD L. COFFEY,
Counsel for Petitioner.

APPENDIX

The pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (U. S. C. #151, *et seq.*), are as follows:

"Sec. 10 (c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the

order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

"Sec. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * *

* * * * *

"No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole

shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

* * * * *

"Sec. 10 (f). * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. [redacted] 20

NEPTUNE METER COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD L. COFFEY,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NEPTUNE METER COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Neptune Meter Company, respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on December 20, 1946 modifying and, as modified, enforcing an order of the National Labor Relations Board dated October 21, 1944.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 465-485) has not, as yet, been officially

reported. The findings of fact, conclusions of law and order (R. 1-24)* of the National Labor Relations Board (hereinafter referred to as the "Board") are reported in 58 N. L. R. B. 1240.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on December 20, 1946 (R. 486). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (43 Stat. 938, 28 U. S. C. Sec. 347(a)) and Section 10(e) and (f) of the National Labor Relations Act (49 Stat. 454, 29 U. S. C. Sec. 160(e) and (f)).

STATUTE INVOLVED

The statute involved is the National Labor Relations Act. (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*, hereinafter referred to as the "Act"). The pertinent provisions of the Act are set forth in an appendix.

STATEMENT OF THE CASE

The order of the Court below entered December 20, 1946 enforces an order of the Board dated October 21, 1944 requiring petitioner to "disestablish" a former organization of its employees known as Employees Representative

*The reference "(R.)" will be used to refer to the Record which has been filed with this petition in this Court. The reference "(IEA R.)" will be used to refer to the Record in the related case involving the Independent Employees Association, also filed in this Court.

Organization (hereinafter referred to as "ERO"). The Court's order was entered at the same time as its order in Case No. 905, *Neptune Meter Company* v. *National Labor Relations Board,* now before this Court on petition for a writ of certiorari, relating to an order of the Board dated March 6, 1946 requiring the petitioner to "disestablish" an organization known as Independent Employees Association (hereinafter referred to as "IEA").

The two cases, which are closely related, were consolidated for argument by the Court below, were heard and considered together and a single opinion was written covering both cases (R. 465-485). In view of the close connection and overlapping of the records in these cases, and the importance of the facts considered and passed upon by the Board subsequent to its order in this case, certain references will be made herein to the record in the case involving IEA (No. 905).

The present proceeding was commenced by the Board on June 8, 1944 upon a charge brought by United Electrical, Radio & Machine Workers of America, affiliated with the CIO, and hearings were held before a Trial Examiner of the Board in July 1944. At these hearings it was shown that commencing in 1919 and prior to passage of the Act, the Company had participated amicably with its employees in an organization known as the "Congress" which dealt with wages, hours and conditions of employment.

Following passage of the Act, the "Congress" was voluntarily disbanded by the Company. Mr. A. H. Ricketts, then Vice-President and Manager of the Company, appeared at a meeting of the "Congress" on August 1, 1935, read to the representatives present the pertinent sections of the new Act, and advised that the Congress "is therefore

discontinued" (R. 53-54, 67, 97-100, 104-105). The employees were informed that they might freely organize themselves as they chose and that the Company would permit them to hold meetings in the cloak room of the plant. The Board found, as stated by its Trial Examiner, that "since the Congress as such has been dissolved and there appears to be no likelihood of its reestablishment, no order will be herein recommended specifically directed against it" (R. 20).

The employees thereafter organized ERO which engaged in vigorous collective bargaining with the Company over a period of nine years (R. 224-230, 364-370). The Company at the time had no rule prohibiting use of its premises for meetings or its typewriters or other facilities by employees engaged in union activities, and the representatives of ERO made use of such facilities and were permitted to engage in such activities without loss of pay from the Company (R. 65-66, 90-91). Because of these facts and the circumstances that ERO followed the "Congress", the Trial Examiner found that the Company was dominating and assisting ERO and recommended its disestablishment (R. 20-21). The record disclosed no evidence at any time of Company hostility to other unions or of discrimination by management, foremen or supervisors against other unions. A union affiliated with the CIO conducted an active campaign and its pamphlets were distributed and posted about the plant without interference or objection by the Company (R. 400-401, 409-410). There was no evidence, and there was no findings to indicate that the Company had been guilty of any of the unfair labor practices specified in the Act other than its alleged assistance to ERO in violation of Section 8(2) of the Act.

The Trial Examiner's intermediate report, dated September 6, 1944, recommended that the Company withdraw all recognition from and post notices disestablishing ERO, and that it cease and desist from "dominating" ERO or any other labor organization, from giving effect to any contracts with ERO, or from "in any other manner" interfering with any of the rights of its employees under the Act (R. 22-23).

The Company received the Trial Examiner's report on September 12, 1944 (IEA R. 605), and voluntarily complied therewith on September 21st by formally withdrawing recognition from ERO, posting the required disestablishment notices, and advising the Regional Director of the Board of its compliance (IEA R. 605). After the Company had elected not to contest the Trial Examiner's report and had disestablished ERO, the Board entered its formal order (R. 1-3) and the Company, to avoid any future question as to its compliance, again posted notices and observed the prescribed formula of disestablishment (IEA R. 613). The Board's order was substantially identical with that recommended by the Trial Examiner except that the blanket cease and desist provisions of Section 1(c) were changed to read as follows:

> "1. Cease and desist from:
>
> * * * * * *
>
> (c) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist United Electrical, Radio and Machine Workers of America, affiliated with the C. I. O., or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activi-

ties, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

The Board did not then seek court enforcement of its order and did not at any time charge petitioner with noncompliance, but on March 22, 1945 brought a new proceeding which charged similar violations of Section 8(2) of the Act and which has resulted in the order in the related petition for certiorari now before this Court (No. 905). Upon the record in that case, which included the complete findings of the Board in the present case (Board's Exhibit 2, IEA R. 471-493), the Trial Examiner made findings (adopted by the Board) showing that petitioner had disestablished ERO (IEA R. 696) and that ERO had, in fact, held its last meeting on July 19, 1944 (IEA R. 685) and was not an existing labor organization (IEA R. 679). He declined to recommend any action against ERO and the Board made no order with respect to ERO. He did recommend a blanket cease and desist provision similar to that contained in Section 1(c) of the order in this case (IEA R. 698-699). In its exceptions to the Intermediate Report, petitioner excepted specifically to the inclusion of this paragraph (IEA R. 642-643), and the Board, after due deliberation, on March 6, 1946, issued its order which eliminated such provision.

No enforcement proceedings were sought in the present case until after petitioner and the IEA had filed petitions to review the Board's order of March 6, 1946 in the IEA case and after almost two years had passed since the hearing in this proceeding. The Board then brought the entire record in the present case before the Circuit Court of Appeals on June 6, 1946 by means of a petition for enforcement of its order of October 21, 1944 (R. 441-444). The

Court below, on December 20, 1946, entered its order over the objections of petitioner enforcing that order with the exception of the requirement for posting notices of disestablishment (R. 486-487).

THE QUESTIONS PRESENTED

1. Whether the court below erred in decreeing enforcement of an order of the National Labor Relations Board containing a broad provision enjoining petitioner from violating any of the provisions of the Act in a case where the Board found only that petitioner had violated Section 8(2) of the Act (amounting to a technical violation of Section 8(1) of the Act) and found no violations or likelihood of violations of other provisions of the Act.

2. Whether the court below erred in failing to hold that in the light of the record, extraordinary circumstances existed justifying petitioner's failure to raise objections before the Board prior to proceedings to enforce the Board's order in the court.

3. Whether the court below erred in decreeing enforcement of an order of the Board directing the disestablishment of a labor organization where petitioner had voluntarily disestablished such organization prior to the time the Board's order was made, where the Board subsequently found that such organization had been disestablished and was no longer in existence, and where more than two years had passed since the Board's order was issued.

Specification of Errors to be Urged

The Circuit Court of Appeals in affirming the order of the Board erred in its rulings on each and all of the foregoing questions.

REASONS FOR GRANTING THE WRIT

I.

The impelling reasons which call for the exercise by this Court of its powers of review in the related case (No. 905) and which have been set forth in the petition filed in that case likewise call for the granting of a writ of certiorari here. The court below has heard the two cases together and reached its decision upon a joint consideration of the record in both cases. In order to pass upon the correctness of the decision of the Circuit Court of Appeals in the related case, it is essential that this case should be brought before this Court for review.

II.

A further question of importance arises from the failure of the court below to dismiss the petition for enforcement on the ground that the proceeding is moot. In so holding the court below has relied upon the decision of this Court in *NLRB* v. *Pennsylvania-Greyhound Lines, Inc.*, 303 U. S. 261 (1938) and has misapplied and extended the holding in that case to a situation to which it has no proper application.

In the *Pennsylvania-Greyhound* case, *supra*, this Court held that an order of disestablishment was not moot when entered against an organization being dominated by the Company at the time the Board's order was made, although subsequent to the entry of the Board's order, an election had been held and another union certified. In the present case the organization ordered to be disestablished had

passed out of existence and had been entirely dissolved by the Company at a time prior to the issuance of the Board's order. In such circumstances, courts of other circuits have held that there is no purpose to be served in "whipping the corpse" and that they will refuse to be party to a futile proceeding.*

In this case, moreover, unlike the *Pennsylvania-Greyhound* case, the circumstances which might have justified the order in 1944 have entirely changed and the Board itself has found that the conditions which called for that order no longer exist and has entered an entirely new order applicable to the changed state of facts. The Court below, by enforcing that order in December 1946, has departed from the ordinary rule against the judicial determination of moot questions to an extent unjustified by the holdings of this Court.

III.

The refusal of the court below to strike from the Board's order the blanket injunctive provision of Section 1(c) thereof (*supra*, page 5) appears to have been based upon a misinterpretation of the decisions of this Court.

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*E. I duPont de Nemours & Co. v. NLRB, 116 F. (2d) 388, 401 (C.C.A. 4th, 1940) Cert. Denied 313 U. S. 571 (1941);

NLRB v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815 (C.C.A. 9th, 1942);

Foote Bros. Gear & Machine Corporation v. *NLRB*, 114 F. (2d) 611 (C.C.A. 7th, 1940), 311 U. S. 620 (1940), 121 F. (2d) 802 (1941);

NLRB v. *Clinchfield Coal Corporation*, 145 F. (2d) 66 (C.C.A. 4th, 1944);

NLRB v. *Mall Tool Co.*, 119 F. (2d) 700 (C.C.A. 7th, 1941);

NLRB v. *Youngstown Mine Corp.*, 123 F. (2d) 178 (C.C.A. 8th, 1941).

This provision is practically identical with that which this Court ordered stricken out in *NLRB* v. *Express Publishing Co.,* 312 U. S. 426 (1941) and *May Department Stores Co.* v. *NLRB,* 326 U. S. 376 (1945). In so holding this Court, in the *Express Publishing Co.* case, *supra,* stated, at page 433:

> "It is obvious that the order of the Board, which, when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

The reasons behind the above decisions of this Court apply directly to the case at bar where there is no finding by the Board of Company hostility to unions nor that there has been or may reasonably be expected to be violations of the Act or any unfair labor practices other than the violation of Section 8(2) of the Act. These are circumstances under which this Court held that a company should not be subjected for an indefinite future time to possible contempt proceedings under an order of such broad scope.

The court below gave no reason for its refusal to correct the Board's order, but such refusal appears to have been based upon the argument of the Board that the Company's failure to urge this objection before the Board precluded its consideration by the court under the holding of

this Court in *NLRB* v. *Cheney California Lumber Co.*, 327 U. S. 385 (1946). In view of the special and extraordinary circumstances of this case, there was no justification for an extension of the holding in the *Cheney Lumber* case, *supra,* to the present situation.

Unlike the *Cheney Lumber* case, *supra,* this is a case in which the failure to raise the objection before the Board was attributable to an honest compliance on the part of the Company with the Board's recommendations. There was no reason to suppose, when the Company made such a choice, that it was jeopardizing its rights or subjecting itself to possible contempt of court for an indefinite time in the event it should in some way violate a blanket injunction of the type which this Court had up until that time held to be illegal. Moreover, the particular provision here enforced appeared for the first time in a form different from that recommended by the Trial Examiner, and there is no provision in the rules of the Board for making exceptions to a final order of the Board after it has been issued. In addition, there is the important and distinguishing fact in this case that the Board itself in a subsequent proceeding found no reason to use a blanket provision of this type and failed to follow the recommendation of its Trial Examiner that such a provision was necessary to effectuate the policies of the Act.

In the exceptional circumstances of this case, the enforcement by the Court below of Section 1(c) of the Board's order was unjustified under the *Cheney Lumber* case, *supra,* and was a departure from the holdings of this Court in the *Express Publishing* case, *supra,* and the *May Department Stores* case, *supra,* which should be reviewed by this Court.

CONCLUSION

WHEREFORE, for the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be granted.

NEPTUNE METER COMPANY,
Petitioner

By EDWARD L. COFFEY,
Counsel for Petitioner

January 17, 1947

APPENDIX

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 USC § 151, et seq.) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interefere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * * * * *

Sec. 10. (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with

or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *"

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IN THE

Supreme Court of the United States

October Term, 1946.

No. [redacted] 22

INDEPENDENT EMPLOYEES ASSOCIATION OF THE NEPTUNE METER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

INDEPENDENT EMPLOYEES ASSOCIATION OF THE NEPTUNE METER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Your petitioner, Independent Employees Association of the Neptune Meter Company (hereinafter referred to as the "I.E.A.") respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on December 20, 1946 modifying and, as modified, enforcing an order of the National Labor Relations Board dated March 6, 1946.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 753-773) has not been officially reported. The findings of fact, conclusions of law and order

of the National Labor Relations Board (hereinafter referred to as the "Board") are reported in 66 N.L.R.B. 292.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on December 20, 1946 (R. 774-777). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (43 Stat. 938, 28 U. S. C. 347[a]) and Section 10(f) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. Sec. 151 *et seq.*).

Statute Involved.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. 151 *et seq.*) are set forth in the Appendix, *infra*, (pp. 21-22).

Questions Presented.

1. Whether a labor organization may be held to be "successor" to a prior employer-dominated labor organization where the Board found that the new organization differed structurally from the old; that its permanent officers never were identified with the old; that its meetings were held away from company premises and outside of working hours; that it was self-financed; that no officials of the company ever participated in its affairs; and where the contracts that it negotiated were beneficial to the employees whom they represented.

2. Whether, in the light of the record, it was proper to infer "successorship" from the alleged failure on the part of the company to disestablish a prior labor organization, Employees Representative Organization (hereinafter referred to as the "E.R.O.") prior to the formation of I.E.A. where the record shows that the I.E.A. was first conceived at informal meetings held in the middle of July, 1944, its first general meeting held on August 30,

1944, its constitution adopted on October 4, 1944, recognition as collective bargaining representative extended on October 14, 1944, and where the record also shows that the Trial Examiner's intermediate report in the E.R.O. case was dated September 6, 1944, received by the company on September 12, 1944, and notices of disestablishment in accordance with the intermediate report were mailed and posted throughout the company's bulletin boards by the company on September 21, 1944.

3. Whether, in dealing with a labor organization confined to the employees of a single plant, it is proper to infer "successorship" from the participation in the formative stages *only* of the new organization of some of the officers of the prior organization.

4. Whether the Circuit Court erred in its conclusion that its power to review the evidence is so "narrowly limited" that it is practically non-existent.

5. Whether the Circuit Court for the Second Circuit has not gone much further than other Circuit Courts of Appeal in upholding Board findings to the extent of making them for all practical purposes completely non-reviewable.

6. Whether the Court below did not err in disregarding the provisions of the Federal Administrative Procedure Act of 1946 in construing its power to review Board findings.

7. Whether, in the light of the record, an order of disestablishment of the I.E.A., which is tantamount to an order for its dissolution, is warranted, particularly in view of the fact that the conclusion of company domination is based, not on its activities, but only on the inferences drawn from its "premature" birth.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in its rulings on each and all of the foregoing questions.

Statement.

The complaint in this proceeding, issued by the National Labor Relations Board on March 22, 1945, arises out of a charge filed with the Board by United Electrical, Radio & Machine Workers of America (C.I.O). In general, it was charged that the Neptune Meter Company was engaged in unfair labor practices within the meaning of Section 8 (1) and (2), of the National Labor Relations Act (49 Stat. 449), in that it was alleged to have initiated, formed and sponsored a labor organization known as the Independent Employees Association of the Neptune Meter Company.

Hearings were held before the Trial Examiner in which all parties, including the I.E.A., participated. On June 16, 1945, the Trial Examiner issued his intermediate report finding the company guilty of the unfair labor practices, as charged, and recommending that it cease and desist therefrom, that it disestablish the I.E.A., and that it withdraw all recognition of the I.E.A. as collective bargaining agent for its employees. On March 6, 1946, the Board issued its decision and order adopting, with slight modifications, the report of the Trial Examiner. A motion was thereafter made by the I.E.A. to reopen the proceedings and take further evidence, or, in the alternative, that the Board order an election to determine the true wishes of the Neptune employees, or, in the alternative, for a clarification of its order insofar as the status of the independent union was concerned. This motion was denied by order of the Board dated March 29, 1946 (R. 726).

The I.E.A. filed its petition for review with the Circuit Court, as did the Neptune Meter Company. The proceedings in the Circuit Court resulted, as beforementioned, in a decree affirming the order of the Board, and granting enforcement thereof. The prevailing opinion was written by Frank, *C.J.*, and concurred in by Clark, *C.J.* The dissenting opinion was written by Swan, *C.J.*

Facts.

A group of employees of the Neptune Meter Company, led by one Koopman, an hourly-paid, non-supervisory employee, held an informal meeting in July, 1944 and decided to form an independent, unaffiliated union of the employees of the Neptune Meter Company. This meeting took place during the course of hearings conducted by the National Labor Relations Board at its regional office in New York, in a proceeding involving the same company with another organization of its employees known as the Employees Representative Organization (E.R.O.). This course was then decided on, for it became obvious to these men that the E.R.O. had been conceived and nurtured in a manner violative of the National Labor Relations Act.

This group, meeting during lunchtime, in a car parked outside the plant, designated themselves an Organizing Committee, and decided to raise a fund through the collection of initiation fees of $1.00 per person. These collections were made, and a total sum of $725.00 was collected.

At a subsequent meeting, held on July 20th, this committee decided to call the new organization the Independent Employees Association. "Thereafter the Organizing Committee distributed, outside the plant, and not in working hours, membership cards to the employees who had previously paid initiation fees" (Opinion of Frank, *C.J.*, R. 761).

On August 29th the Committee similarly distributed notices of an initial organization meeting of the I.E.A. to be held the next night, August 30th, after working hours and outside the plant (R. 234, 295-296). The minutes of this meeting show that it was attended by over 600 men and women representing a substantial majority of the employees of the company. Koopman presided at that meeting and explained that his Organizing Committee had "sounded out the employees throughout the shop and decided to become an organizing committee, *form a brand*

new independent organization, and start off with a clean slate and drop any contact with the old organization or management. The committee, therefore, undertook the organizing of that union with the conviction *that the E.R.O. was a thing of the past and would definitely not enter into their thoughts in the future* (Board's Exhibit 8, R. 523-524).

At this meeting, temporary officers were elected by a closed ballot to serve until the end of the calendar year. The Trial Examiner, in referring to these temporary officers, stated that "of those elected as temporary officers only J. Dauwalter, who was elected temporary treasurer, and Rita Mazika, who was elected temporary secretary, appeared to have been officers of, or otherwise prominent in, the E.R.O." (Trial Examiner's Report, R. 686).

The first meeting, as well as all subsequent meetings, were held away from the company premises and outside of working hours (R. 70-71, 126-148, 233, 372). These meetings were always well-attended, with full opportunity for free discussion of all subjects coming before it (R. 94, 233-234, 296-297). No supervisory employee, foreman or company official ever participated in any of these meetings (R. 147, 234, 296-297, 398-399).

By letter dated September 7, 1944, the I.E.A. demanded recognition from the company as bargaining agency for its employees (R. 401). A meeting to discuss the matter was held a week later and recognition was refused. Thereafter, the employees insisted at a general meeting that, inasmuch as it represented an overwhelming majority of the employees, recognition must be extended to their organization. The minutes of this meeting, held on October 4th and which were marked in evidence (Board's Exhibit 8, R. 523) showed that the employees, against the advice of counsel, insisted upon immediate recognition and there were threats at that meeting of a work stoppage unless such was granted. Subsequently, a meeting was held

on October 12th between the committee representing the I.E.A. and management, and after a stormy session at which there were again threats of a work stoppage (R. 280), recognition was promised, provided that proof of majority status was demonstrated. Several days later cards were produced for over 600 employees out of a total of 750 eligible (R. 394), and recognition was accordingly granted.

In the meanwhile, on September 6th, the Trial Examiner in the E.R.O. case had issued his intermediate report, recommending disestablishment of the E.R.O. and withdrawal of recognition. This report was not received by the company until September 12th (R. 605). On September 21st, in compliance with the directions contained in such report, and within the time period specified therein, notices were published on all bulletin boards throughout the plant of the disestablishment of the E.R.O. (R. 607-609; 611).

On October 6, 1944, a business agent of the Molders Union, affiliated with the American Federation of Labor, called upon the management and made vague assertions to the effect that his union represented a majority of the employees in the Foundry Division of the plant (R. 201-203). The Foundry at that time employed about 100 persons. His claim for recognition was rejected by the company. The I.E.A. representatives were apprised of the Molders Union claim at the meeting with management held on October 12th. The I.E.A. representatives advised the management that they represented "all the Foundry or the majority of the Foundry" (R. 383) and were ready to produce membership cards then and there showing such representation. Some months later, that union filed a petition for certification with the Board. No action was taken by the Board upon this petition until some time in July, 1945 when a hearing was held. Thereafter and on April 29, 1946, the Board issued its decision directing that an

election be held on May 23, 1946 among the Foundry Division employees. *Prior to the election, the Molders Union asked the Board that its name be withdrawn from the ballot.* The C.I.O., the charging union, was the only name appearing on that ballot, but was defeated by the Foundry Division employees.

After a number of meetings with management, and after full discussion by the membership, a contract governing wages, working conditions, etc. was entered into between the I.E.A. and the company on January 1, 1945 (R. 575). This contract contained benefits not previously enjoyed by the employees (R. 690, 695).

From the time of its inception down to and including the date hereof, the I.E.A. has been zealous in the protection of the rights of the employees of the Neptune Meter Company. Since its first contract it had entered into a number of other contracts in which substantial benefits were accorded to the employees.

In December, 1944, permanent officers were elected (R. 184-186). The Trial Examiner found that "none of the officers elected at that time appeared to have been officers of the E.R.O. or otherwise prominently identified with it" (Trial Examiner's Report, R. 690).

The Trial Examiner stated that these facts "standing alone (it) would not seriously challenge the legitimacy of the organization". On the basis of inferences, however, from these facts, he, and the Board, did recommend disestablishment and withdrawal of recognition. A fair summary of the Trial Examiner's view is to be found in the following quotation from this report (R. 695):

> "Although convinced and finding that the I.E.A. was initiated, sponsored and formed as a successor organization to the E.R.O., and that the influences of company domination therefore prevailed at its inception and formation, *the undersigned further finds*

that the I.E.A. as an organization differs structurally from the E.R.O. in that the constitution and bylaws of the former provide, *inter alia,* for regular meetings of the general membership, membership dues and initiation fees, and autonomy in the election of officers and further conduct of its business as a labor organization. *Officers chosen, with few exceptions, have not been prominently identified with the prior company dominated organizations.* Beginning with the organizational meeting of August 30, 1944, all of its meetings appear to have been held away from Respondent's premises and outside of working hours. No supervisors or officers of the Respondent have participated therein. The contract executed by the I.E.A. and the Respondent on January 1, 1945, appears to have been agreed upon after several bargaining conferences and incorporates certain benefits not previously enjoyed by the employees. Standing alone, it would not seriously challenge the legitimacy of the organization. *In short, it appears that the I.E.A. has made a consistent effort to divest itself of the indicia of company domination.* To effectuate the purposes and policies of the Act it appears necessary, however, that the employees be afforded a fair and full opportunity to exercise the freedom of choice guaranteed by the Act, and this can be accomplished only by a 'recreation of conditions in which genuinely free choice can be exercised.' To that end the undersigned *feels constrained,* in view of Board and Court decisions, to recommend the remedy normally applied in like cases." (Italics ours.)

Reasons for Granting Writ.

The basic questions in this case are whether, under the facts as developed at the hearing, it was proper for the

Board to find that the I.E.A. was "successor to or grew out of" the E.R.O. and whether the Court below correctly construed its powers to review Board findings in a case of this sort, holding, as it did, that this power was only narrowly theoretical and of but little practical application.

We earnestly urge that the questions here presented are novel in this respect. Heretofore, in all cases of domination and successorship that we are aware of, there were always present some elements of domination, positive and affirmative, of the independent union by the company, or of subservience to the company, to a greater or lesser degree. In this case, not a single finding of the Board points up any such evidence. The conclusion of the Board as to domination and successorship is based entirely upon inferences, and not on any of the elicited facts.

As already pointed out, we are here dealing with an organization confined to the employees of a single plant. The employees were the same, or substantially the same, during the period of activity of the former organization, the E.R.O., as during the period of activity of the I.E.A. the organization here involved. All the factual findings of the Board were on the credit side of the I.E.A. Both, the Trial Examiner, and the Board, took pains to point out that the I.E.A. meetings were largely attended, its activities were free of the slightest indicia of company domination, its activities resulted in benefits to the Neptune employees, and it at all times and from its inception enjoyed the highest confidence of those it represented. The Board, however, made its findings of company domination and successorship on two grounds. First, that some of those who initiated the I.E.A. had at one time or another held minor offices in the E.R.O. and further, that the I.E.A. was formed prior to what the Board deemed formal disestablishment of the E.R.O.

A. It Was Error to Infer Company Domination From Participation in the Formative Stages of the New Organization of Some Representatives of the Old.

Taking up first the alleged sponsorship of the I.E.A. by a group of E.R.O. representatives and officers, we should like to state that it is a well-known fact that leadership, given the opportunity, will out, whether we like it or not. Persons who are leaders are not content to sit idly by when opportunities for leadership arise. There is no rule in law, and there is none in the National Labor Relations Act, which prohibits any persons from taking the initiative in the formation of a labor organization. The only requirement laid down by the Act, and by the rules of the Board, is that these people have no connection whatsoever with management. The status of Koopman, chairman of the organizing committee, and the status of the other members of his committee, was never questioned by the Board (R. 227). They were, and are, non-supervisory employees with not the slightest connection with management.

On the matter of the participation in the new organization by some of those who were active in the old, we should like to quote from *Magnolia Petroleum Co.* v. *N.L.R.B.*, 112 F. 2d 545 (C. C. A. 5).

> "In the argument before the Court in answer to a question from the bench, whether it was the Board's contention that men who had ever been connected with a union which in the opinion of the Board was company dominated or supported, were thereby *forever debarred* from assisting to form another organization, counsel for the Board stated 'No, but the Board feels that there should be a breathing space between the dissolution of one organization and the formation of another'.

> "We find no support in the authorities nor in the Act for such a view."

Judge Swan expressed the same view in his dissenting opinion in the case at bar, when he said:

> "Naturally, it was true that some of the leaders in E.R.O. took a leading part in organizing I.E.A. If this is enough to taint the latter, I do not see how an independent union can ever be organized, for the leaders among the employees will necessarily be the initiators of the new organization."

There are a number of cases in various circuits which hold that the fact of participation in the new organization by officers and members of the old is not, in and of itself, sufficient to warrant a finding of successorship. *Kansas City Power & Light Co.* v. *N.L.R.B.*, 137 F. 2d 77 (C. C. A. 8). (Some of the officers of the old took part in the new organization.) *N.L.R.B.* v. *El Paso Electric Co.*, 133 F. 2d 168 (C. C. A. 5). (The attorney for the former organization acted as the attorney for the new organization.) *N.L.R.B.* v. *Clinchfield Coal Corp.*, 145 F. 2d 66 (C. C. A. 4). (The new organization was guided by the attorney for the former organization and by some of the officers of the old organization.)

B. The Board, and the Court Below, Have Erred in Stressing Alleged Formation of I.E.A. Prior to "Disestablishment" of the E.R.O.

As to the finding that the I.E.A. was formed prior to alleged formal disestablishment of the E.R.O., we might give the short answer that the employees were free to form a new organization as, and when, they saw fit, and second, that the company could not, even if it would, control the actions of the employees, either as to timing, or

in any other manner. Any other action on the part of the company would be an unwarranted interference with their employees' rights freely to organize under the Act.

Furthermore, a recital of the important dates in this proceeding shows conclusively that this finding is clearly erroneous.

The preliminary organizing steps took place in July and August, 1944 (R. 229-233, 517); the Trial Examiner's intermediate report was issued September 6th and received by the company September 12th (R. 474-493); posting of notices of disestablishment of E.R.O. on the fifteen bulletin boards scattered throughout the plant took place on September 21st (R. 605-612); the I.E.A. constitution was adopted October 4th (R. 500-516); recognition was granted on October 14th (R. 543).

On this score, we should again like to refer to the case of *Magnolia Petroleum Corp.* v. *N.L.R.B.*, 112 F. 2d 545, where the Court said:

> "Indeed, in *Brown Paper Mills* v. *N.L.R.B.*, 108 F. 2d 867, the contrary of that was decided. 'The Act does not compel employees to affiliate themselves nor does it prevent them from forming an independent local organization of their own', and after further saying that the Association should be completely disestablished as representative of the employees, we said: 'this does not mean, of course, that the employees may not *immediately*, provided it is with complete independence and freedom from the domination, interference or support of the management, form their own union. It certainly does not mean that they must join the organization of the complainant.'"

The same rule was laid down by the Board itself in the matter of *Mohawk Carpet Mills*, 12 N.L.R.B. 765, wherein the Board stated:

> "It is true that the movement for an independent union * * * began at a time when the Employees Representative plan was under attack as being company dominated and was participated in by employee representatives of the plan. However this circumstance is not alone sufficient to warrant a conclusion that the resulting organization is a creature of the respondent."

Evidently the Trial Examiner and the Board, in treating the subject of disestablishment of the E.R.O., felt that some formal act to effectuate this purpose was necessary on the part of both the E.R.O. and the company.

So far as any formal act on the part of the E.R.O. is concerned, we respectfully urge that, bearing in mind the character of that organization, none was necessary. The E.R.O. was a very loose organization. The employees of the Neptune Meter Company were members not because of any enrollment in the organization, but only by virtue of their employment. They paid no dues, and consequently there was no treasury, therefore no moneys to divide. They held no general membership meetings; there was, therefore, no need or occasion to hold one for the purpose of dissolving. It was not organized under any law of the State of New York; there were, therefore, no formal, legal steps to be taken looking to dissolution. The organization was simply treated by its officers as being dead (R. 518).

Insofar as action on the part of the company is concerned, the evidence is clear that it took all the necessary steps that were required of it. There was no obligation, either legal or moral, on the part of the company to take any steps *prior* to the issuance of the Trial Examiner's intermediate report. After that report was received on September 12th, full compliance was had within the ten

days set forth therein. Furthermore, when the Board's order was received, the company again, on October 21st, posted notices as required by the Board's order, in the same widely publicized manner.

In the light of the record, the case of *Westinghouse Electric Mfg. Co.* v. *N.L.R.B.*, 112 F. 2d 657 (C. C. A. 2), affirmed *per curiam*, 312 U. S. 660, so heavily relied upon by the Board has no applicability here. In that case, "the company had done nothing to mark the separation between the two" organizations, and "the employees at large had not been advised that the company was wholly indifferent whether they joined the new union." Here, the company did make the announcement required by the Board in the *E.R.O.* case.

And under the facts in this case, to put the question set forth in the case of *N.L.R.B.* v. *Standard Oil Co.*, 138 F. 2d 885 (C. C. A. 2) of " 'whether the employees have been properly disabused of the earlier influences under which—in the case at bar—they had been bargaining for the preceding nineteen years,' " is to give the answer. For over two years, despite the intensive propaganda by the C.I.O., and the pressure of the adverse decisions of the Trial Examiner, and the Board, the Neptune employees have continued to give to the I.E.A. their complete support in constantly growing membership, and by their quarters and dollars. It is safe to say here, as was said by the Court in the *Donnelly Garment Co.* matter, 141 F. 2d 854 (C. C. A. 8) (now awaiting decision by this Court, October Term, 1946, Docket Nos. 38-39):

> "Throughout this period they have been fully advised of their rights under the National Labor Relations Act. * * * In this situation, there is no room, in my opinion, for the inference that these employees have been, and continue to be, the victims of an illegal coercion by means unknown to them and too subtle to be susceptible of proof, or

for the inference that they have surrendered their right freely to choose their labor affiliation in return for the occasional inconsequential use of the Garment Company's telephones, mimeograph machines, and office facilities."

(*Of course, no such uses were even hinted at in this case.*)

C. The Court Below Did Not Properly Apply the Substantial Evidence Rule.

The Court below, by its decision, has completely destroyed the requirement of substantial evidence, and has abdicated its power to review findings of the Board.

In *N.L.R.B.* v. *Standard Oil Co.,* 138 F. (2d) 885, the Second Circuit Court took the view that a finding of the Board on the issue of successorship was "for all practical purposes not open to us at all", and that while "Theoretically * * * the Court could say that there was no 'substantial' evidence to support an order of disestablishment * * * any such reserve is not very real."

That Court took the same view in the case of *Westinghouse Electric & Mfg. Co.* v. *N.L.R.B.,* 112 F. 2d 657 (C. C. A. 2) and in the case of *Sperry Gyroscope Co.* v. *N.L.R.B.,* 128 F. 2d 922 (C. C. A. 2).

In the case at bar, the Second Circuit Court went still further. Judge Frank, writing for the majority, stated that he construes the law to be that the Court should not interfere with the Board's decision unless that decision was *"irrational"*.

We respectfully urge that this view is in conflict with the decisions of other circuits. In these other circuits, the Courts have set aside orders of the Board on the ground that they were not supported by substantial evidence where they were based upon facts much more favorable to the Board than that prevailing in the case at bar.

The Circuit Court of Appeals for the Seventh Circuit in the case of *Keystone Steel & Wire Co.* v. *N.L.R.B.*, 155 F. 2d 553 (certiorari granted by this Court November 12, 1946) recently set aside an order of the Board in a successor case on the ground that there was no substantial evidence. The Court so held despite the fact that the evidence revealed that officers in a prior company dominated union took a leading part in the formation of the new organization; that numerous witnesses testified that at the time they signed membership cards with the Alliance they did not know of the dissolution of the K.E.A.; that the company never made any public statement to its employees respecting the dissolution of the K.E.A.; that the K.E.A. treasury was transferred to the Alliance; that company supervisors expressed hostility to other unions; and that a number of supervisory employees had joined the new organization.

Despite the fact that no such testimony was adduced in the case at bar, the Second Circuit Court did sustain a Board finding of company domination.

The decision of the Court below is also in direct conflict with numerous other decisions of the Seventh Circuit Court, such as, *A. E. Staley Mfg. Co.* v. *N. L. R. B.*, 127 F. 2d 68; *N. L. R. B.* v. *Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594; *Foote Brothers Gear & Machine Corp.* v. *N. L. R. B.*, 114 F. 2d 611 (remanded 311 U. S. 620, reaffirmed 121 F. 2d 802).

Other Circuit Courts have likewise construed their powers to review much more broadly, and, in numerous instances, involving successor organizations, have set aside orders of the Board as not being based upon substantial evidence. *Humble Oil & Refining Co.* v. *N. L. R. B.*, 113 F. 2d 85 (C. C. A. 5); *N. L. R. B.* v. *El Paso Electric Co.*, 133 F. 2d 168 (C. C. A. 5); *N. L. R. B.* v. *Clinchfield Coal Corp.*, 145 F. 2d 66 (C. C. A. 4); *N. L. R. B.* v. *Hollywood-Maxwell Co.*, 126 F. 2d 18 (C. C. A. 9).

We also urge that the decision of the Court below is based upon a misconstruction and misconception of the decisions of this Court, which has clearly laid down the rule that decisions of the Board must be based upon substantial evidence. *N. L. R. B.* v. *Columbian Enamelling & Stamping Co.*, 306 U. S. 292; *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793.

D. The Decision of the Court Below Is Out of Harmony With the Federal Administrative Procedure Act of 1946.

It is respectfully submitted that the Court below completely disregarded the provisions of the Federal Administrative Procedure Act of 1946 in its estimate of its power to review, as defined in the said Act (Public Law 404—79th Congress—C. 324—2nd Session).[1]

It is apparent from the discussion on the floor of both the U. S. Senate and House of Representatives that it was the intent of this legislation to broaden the powers of review of administrative agencies by the Circuit Courts and to eliminate the conception on the part of the Circuit Courts that they had no real power to review administrative agency findings.

In its report of November 19, 1945, the Senate Judiciary Committee, referring to this legislation, stated as follows:

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[1] Section 10(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

"The 'substantial evidence' rule set forth in section 10(e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required."

In an analysis of the Administrative Procedure Act, the Bureau of National Affairs in a pamphlet published June, 1946, cites the following colloquy on the floor of the Senate, in a discussion of the effect of Section 10(e) thereof (Congressional Record, March 12, 1946, p. 2199):

"Mr. George: The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have lead the courts to hold —and they so hold—that if there be any evidence to sustain the finding of a Board or agency, the Court has no power to interfere with it.

Mr. McCarran: I would put it in this way——

Mr. George: Would the enactment of this bill require some substantial or probative evidence to support such a finding?

Mr. McCarran: Yes.

Mr. George: Take the Labor Relations cases. Senators are familiar with them. The circuit courts have frequently complained against what the Labor Relations Board did, but have said, 'We are powerless to interfere with it.' Would this bill, change that rule, if the Court were of the opinion that there was no probative evidence?

Mr. McCarran: Yes, it would change that rule.

Mr. George: I am pleased to hear it."

E. On the Facts of This Case, the Provision in the Board's Order for Disestablishment of the I.E.A. Is an Abuse of Discretion, and an Unwarranted Arbitrary Act.

The Board having found no element of company domination over the I.E.A. and the I.E.A. activities, *per se*, being beyond criticism, this Court should set aside the order of disestablishment which is, in effect, an order for dissolution, inasmuch as the Board has made it a firm policy never to certify a disestablished union. In view, further, of the firm desire on the part of the Neptune Company employees to be represented by the I.E.A., to permit the order of disestablishment to stand, would deprive these employees of the rights guaranteed to them under the Act freely to organize and to choose a collective bargaining representative of their own choice.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

INDEPENDENT EMPLOYEES ASSOCIATION OF THE NEPTUNE METER COMPANY,

By IRVING SWEET,
Counsel for Petitioner.

APPENDIX.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

* * * * *

Sec. 8. It shall be an unfair labor practice for an employer——

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of

employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

Sec. 10. (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 905

NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 906

NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 917

INDEPENDENT EMPLOYEES' ASSOCIATION OF THE NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions in the court below (ERO R. 465–485; IEA R. 753–773) have not yet been reported.

The findings of fact, conclusions of law and order of the National Labor Relations Board in No. 906 (ERO R. 1–24) are reported in 58 N. L. R. B. 1240, and those in Nos. 905 and 917 (IEA R. 670–700) are reported in 66 N. L. R. B. 292.

The court below entered a single opinion (ERO R. 465–485; IEA R. 753–773) covering all the proceedings now before this Court upon the petitions for writs of certiorari filed herein.

For convenience, references to the record in No. 906 are designated "(ERO R. —)"; references to the record in Nos. 905 and 917 are designated "IEA R. —)".

JURISDICTION

The decrees of the court below (ERO R. 486–487; IEA R. 774–777) were entered on December 20, 1946. The respective petitions for writs of certiorari were filed on January 17, 1947, in Nos. 905 and 906 and on January 20, 1947, in No. 917. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

IN NO. 906

1. Whether enforcement proceedings under the National Labor Relations Act are rendered moot by virtue of an employer's compliance, prior to

the institution of enforcement proceedings, with an order of the National Labor Relations Board directed against it.

2. Whether in enforcement proceedings under the Act an employer and the reviewing court are, respectively, precluded from raising or entertaining the issue of the propriety of a Board order directed against the employer where the order adopts the recommendations of the trial examiner and the employer took no exception thereto before the Board.

3. If the foregoing question is answered in the negative, whether the Board, upon finding that an employer in violation of Section 8 (2) and (1) of the Act has dominated every aspect of the organizational life of its employees over an extended period of time, may properly order the employer to cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

IN NOS. 905, 917

1. Whether, where one labor organization succeeds in point of time an employer-dominated labor organization under the sponsorship and leadership of officers and representatives of the predecessor organization, and the employer has failed, prior to the formation of the second organization, to withdraw recognition from, and disestablish, the earlier organization as the collective

bargaining representative of its employees and thereafter evinces favoritism for the second organization, the court below properly held that the Board's conclusion that the second organization is employer-dominated in violation of Section 8 (2) and (1) of the Act is a rational inference supported by substantial evidence and therefore conclusive.

2. Whether, upon a showing that an employer has dealt with three successive labor organizations existing in violation of the Act, the Board may order the employer to cease and desist from recognizing or dealing with any labor organization as the collective bargaining representative of its employees unless and until such labor organization shall have been certified by the Board as such representative.

3. Whether the Federal Administrative Procedure Act of 1946 is applicable to the instant proceedings, all of which were pending prior to its enactment; and, if applicable, whether it requires a result different from the one reached by the court below.

4. Whether a Board order requiring an employer to withdraw recognition from, and completely disestablish, an employer-dominated labor organization, represents a proper exercise of the Board's power.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, pp. 34–35, *infra*.

STATEMENT

NO. 906

Upon the usual proceedings under Section 10 of the Act, the Board on October 21, 1944, issued its findings of fact, conclusions of law and order (ERO R. 1–24). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

In 1919, petitioner, The Neptune Meter Company, hereinafter called the Company, initiated, sponsored and financed the formation of an employee representation plan for its employees known as the Congress of Neptune Meter Company, hereinafter called the Congress (ERO R. 7–8; 26–27, 28–37, 113–114). The Congress consisted of the House, composed of representatives of non-supervisory employees, the Senate, representing supervisory employees, and the Cabinet composed of representatives of higher management in whom the executive power of the Congress was vested (ERO R. 8–9; 33–34, 119–

[1] In the following statement, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

126). Proposals passed by the House, and concurred in by the Senate, relating to wages, hours, or working conditions as well as amendments to the organization's constitution became effective only with the approval of the management representatives in the Cabinet (ERO R. 9; 47–53, 124, 126). Membership in the Congress of all employees was automatic and conferred only the right to vote in an annual election of representatives (ERO R. 8; 44–45, 85–103). It carried no obligation to pay dues (ERO R. 8; 42–43). No provision was made for participation in the affairs of the Congress by the employees generally. No meetings of the general membership were held (ERO R. 8–9; 38). The House officers were elected, not by the employees generally, but by the representatives (ERO R. 9; 124).

The Company paid various expenses of the Congress and furnished it with various items (ERO R. 9; 40, 41, 45–46, 55–58, 100). It paid the representatives for all time spent in meetings of the organization or on other business of the Congress (ERO R. 9; 41–42, 58–59, 90–93, 131). All meetings and business of the Congress were conducted on the Company's premises (ERO R. 9; 39–40, 54).

On August 1, 1935, A. H. Ricketts, then vice president and manager of the Company, appeared at a meeting of the House and informed the representatives that the provisions of the then re-

cently-enacted National Labor Relations Act made it unlawful for an employer to contribute financial or other support to a labor organization and that, accordingly, the so-called system of "industrial democracy" then in effect at the plant would be "discontinued." Ricketts did not advise the Congress representatives or the employees at large that the Company would no longer recognize or deal with the Congress as their collective bargaining agent. Instead, he informed the representatives that the employees had a "perfect right," if they so desired, "to continue the representative plan as it is now being carried on" and that in order to facilitate its continued functioning, the Company would, as in the past, permit the employees to hold their meetings in the plant and on company time (ERO R. 10–11; 53–54, 67, 97–100). Ricketts' suggestions were thereafter conveyed to the employees (ERO R. 11; 100).

Thereafter, representatives and officers of the Congress, which continued to function, undertook the task of revamping it. After it was ascertained by means of a poll which they conducted among the employees at the plant during working hours that the latter were satisfied with the type of organization and representation then in existence at the plant (ERO R. 12–13; 68–73, 106–107, 269), the president of the House, on September 9, appointed a committee to draft a constitution (ERO R. 13; 73–74, 107). The committee selected

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the name, Employees' Representation Organization, hereinafter called the ERO, for the revised representation device and prepared a constitution. On October 21, 1935, the House, after amending the draft of the proposed constitution in various respects, adopted it (ERO R. 13; 73–78, 100–102, 107–108). The employees generally were afforded no opportunity to consider, adopt or reject any provision of the revised constitution other than the preamble and platform set forth in it (*ibid.*).

Under this constitution, the organic structure of the ERO did not, except for the elimination of the patently illegal employer participation which had marked the Congress, differ materially from that of the latter. Like that of the Congress, the ERO constitution provided for automatic membership of all employees (ERO R. 14; 84–85, 103, 62–63). No membership meetings or dues payments were provided for, and, in fact, no general meetings were held; nor were any dues ever collected by the ERO (ERO R. 14; 67, 80, 102). As in the Congress, representatives forfeited their office upon a permanent transfer from the department which had elected them or upon the termination of their employment (ERO R. 14; 86–87).

The Company continued to extend to the ERO the support and assistance which it had previously accorded to the Congress. It continued to

permit meetings of the ERO on company property during working hours (ERO R. 14; 54, 60, 66, 81, 92). It paid the representatives of the ERO for time spent in conducting its affairs or transacting its business during working hours (ERO R. 14–15; 62, 60, 65–66, 81, 90–91, 131). It also permitted ERO elections to be conducted on its premises and during working hours (ERO R. 15; 81–83). It furnished various kinds of supplies to the ERO and permitted it to make free use of its printing and mimeographing machines (ERO R. 15; 61–62, 65–66, 82–83, 91–92). In 1937, the Company entered into a collective bargaining agreement with the ERO.[2] Similar agreements were executed in the years following (ERO R. 15; 102–103, 108–109, 110–111).

Upon the foregoing facts the Board's trial examiner found (ERO R. 4–19) in his intermediate report, dated September 6, 1944, that the Company in violation of Section 8 (2) and (1) of the Act had dominated and interfered with the administration of, and contributed support to, the Congress and dominated and interfered with the formation and administration of, and contributed support to, its successor, the ERO. Accordingly, he recommended (ERO R. 22–23)

[2] The record discloses that in 1937 when this contract was executed, another labor organization had begun organizational activities among the Company's employees (ERO R. 102, 110–111).

that the Company cease and desist from its unfair labor practices with respect to the ERO[3] and withdraw recognition from, and completely disestablish, it as the collective bargaining representative of its employees. The trial examiner also recommended (ERO R. 22–23) that the Company cease and desist from—

> In any other manner interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

On October 21, 1944, the Board (ERO R. 1–3) issued its decision and order adopting the findings, conclusions and recommendations of the trial examiner.[4] The Board's order (ERO R. 2–3) is in all respects similar to that recommended

[3] Since the Congress had been dissolved and there was no likelihood of its reestablishment, the trial examiner made no recommendations with respect to it (ERO R. 20).

[4] The Board, like the trial examiner (ERO R. 1, 10), made no findings of unfair labor practices with respect to the Congress based on events which occurred prior to July 5, 1935, the effective date of the Act, but it properly considered them as relevant background for its findings. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 268–270; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249–250.

by the trial examiner save for the following underscored addition in the general cease and desist provision:

> In any other manner interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist *United Electrical, Radio & Machine Workers of America, affiliated with the C. I. O., or any other* labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

Following both the issuance of the trial examiner's intermediate report and the Board's decision and order, the Company on September 21, and again on October 31, 1944, posted notices at its plant, stating that it would comply with the trial examiner's recommendations and the Board's order (ERO R. 452, 459–460).

On June 4, 1946, the Board filed in the court below a petition to enforce its order (ERO R. 441–444). On November 29, 1946, the court entered its opinion (ERO R. 465–485) in which it held, *inter alia,* that the Board's findings with respect to the Congress and ERO were supported by substantial evidence (ERO R. 469). The court also held that the Board's order had not become moot by reason of the Company's posting of no-

tices in compliance with the recommendations of the trial examiner and the order of the Board (ERO R. 482). The court, accordingly, enforced the Board's order, as modified in a manner not here material (ERO R. 482, 484). On December 20, 1946, the court entered its decree enforcing the Board's order, as modified (ERO R. 486–487).

NOS. 905, 917

Upon the usual proceedings under Section 10 of the Act, the Board on March 6, 1946, issued its findings of fact, conclusions of law, and order in the proceedings now pending before this Court on petitions for writs of certiorari in Nos. 905 and 917 (IEA R. 670–700). The facts as found by the Board and as shown by the evidence may be summarized as follows:

On June 8, 1944, the Board issued its complaint in the proceedings before this Court in No. 906, alleging that the Company's conduct with respect to the Congress and the ERO was violative of Section 8 (2) and (1) of the Act (ERO R. 4–5). A copy of this complaint was served on President Landi of the ERO (IEA R. 681; 38–40, 494). On June 15, 1944, Landi summoned the organization's representatives and notified them that their practice of conducting ERO meetings on the Company's premises might be violative of the Act (IEA R. 681; 494). The representatives thereupon voted that in the event the Board, as a result of the proceedings pending before it, or-

dered the ERO to discontinue holding meetings on the Company's property, they "proposed to hold [their] future meetings on the outside and continue to hold the Organization in its existence." It was also decided to take a poll of the employees to ascertain whether or not they "still want to carry on with our present Organization by holding meetings on the outside" (IEA R. 681; 20–22, 40–41, 45–46, 494–495).

On June 20, a notice was posted in the plant over the signature of Landi as president of the ERO stating that the representatives of the ERO had been instructed to take a vote among the employees to determine whether or not they wished to "continue with the present Employees' Representative Organization with meetings being held on the outside" (IEA R. 681–682; 47–48, 498). The poll was conducted by ERO representatives during working hours in the plant and resulted in a large number of employees voting in the affirmative (IEA R. 682; 50–51, 109–110, 496–497).

Following this poll, Landi, at a meeting held on plant premises during working hours, designated various representatives of the ERO as members of an Organizing Committee in order to draft "plans" in accordance with the expressed wishes of the employees "to continue our Organization with meetings to be held on the outside" (IEA R. 682; 54–60, 497). The employees were then notified of this action and the names

of the committee's members were posted on the plant bulletin boards (IEA R. 682; 55).[5]

From July 10 to July 12, the Board conducted a hearing on its complaint concerning the Congress and ERO. Various representatives and officers of the ERO attended the hearing, among them the members of the Organizing Committee appointed by Landi (IEA R. 683; 221–222, 243). During the course of the hearing the members of this committee, now joined by Secretary Dauwalter and representative Morgan of the ERO (IEA R. 63–64), concluded that on the basis of the testimony adduced at the hearing, it was doubtful whether the ERO met the requisite standards prescribed by the Act and that it would be necessary, therefore, to form a "new" organization in order to comply with the statute (IEA R. 683; 222–226, 227–228).

On July 13, 1944, the day following the close of the Board hearing, this group of employees again met. They constituted themselves as the "Organizing Committee." Under the chairmanship of Koopman, who had been chairman of the

[5] According to Landi and Koopman, who was also appointed to the original organizing committee, this committee never functioned (IEA R. 682; 60, 220–221). It is undisputed, however, as the Board found (IEA R. 682), that the same persons named by Landi as the Organizing Committee, with the addition of Secretary Dauwalter and representative Morgan of the ERO, subsequently became the chief organizers of the ERO's successor and designated themselves as the "Organizing Committee".

ERO Grievance Committee since 1942, and had been otherwise prominently identified with it from its inception (IEA R. 683; 223–226, 237–238), it was agreed to form "a brand new organization" and to solicit initiation fees of one dollar from each of the employees to finance it. (IEA R. 683; 118–119, 229). On the same day, a drive was instituted to collect initiation fees from the employees and within a few days the Committee and those designated to assist it collected approximately $700 (IEA R. 683–684; 245). A portion of this sum was collected by one member of the Committee at the plant during working hours (IEA R. 671–684; 113–114, 229). These fees were turned over to Secretary Dauwalter of the ERO (IEA R. 684; 235).

Thereafter, Koopman asked President Landi of the ERO to call a special meeting of its representatives (IEA R. 685; 228–229). At this meeting, held on July 19, 1944, the representatives were informed that "a brand new organizing committee" had been formed and that no further meetings of the ERO would be held (IEA R. 685; 229, 292). No formal action was taken dissolving the ERO (IEA R. 685; 292–293). Nor were the employees generally given formal notice that the ERO had been discontinued;[6] the

[6] Employees had been generally informed of the action of ERO representatives by the posting of the minutes of their meetings (IEA R. 681; 48). No minutes of the meeting of July 19 were taken or posted (IEA R. 685; 268, 293).

results of the meeting of July 19 were reported orally to the employees by the representatives who had been present (IEA R. 685; 269).

Thereafter, Koopman and other members of the Organizing Committee proceeded to perfect the formal organization of the Independent Employees Association of the Neptune Meter Company, hereinafter called the IEA (IEA R. 685; 141–143). They selected its name (IEA R. 685; 270–271). They caused membership cards to be printed and distributed to the employees who had already paid their initiation fees (IEA R. 685; 117, 269–270, 574). On August 29, the Organizing Committee distributed notices signed by the committee members, informing the employees that "the initial organization meeting of the newly formed Neptune Employees Association" would be held the following night (IEA R. 685–686; 499). At that meeting, Koopman presided. He informed the employees present that the Organizing Committee had been originally established to reorganize the ERO so as to eliminate the use of company time and property but that it had been subsequently decided to form "a brand new independent organization." The Organizing Committee, he further reported, had undertaken the task of organizing a union "with the conviction that the ERO was a thing of the past." (IEA R. 686; 517–518). Temporary officers of the IEA were then elected (IEA R. 686; 520–522). The Board found that two of these

temporary officers, Rita Mazeika and Vincent Dauwalter, who were elected, respectively, secretary and treasurer of the IEA, had been ERO officers (IEA R. 686; 70, 521–522).[7]

On September 7, 1944, the IEA informed the Company that it represented a majority of the employees at the plant and requested a conference for the purpose of establishing its representative status and obtaining recognition (IEA R. 687; 592).[8] On September 14, the Company informed the IEA that it would not recognize it because of the proceedings then pending before the Board with respect to the ERO (IEA R. 687; 325, 387–388).

Meanwhile, the Board's trial examiner had on September 6, 1944, issued his intermediate report finding that the ERO and its predecessor, the Congress, were company-dominated labor organizations and recommending that the Company disestablish the ERO (IEA R. 680; 474–493). On September 21, the Company for the first time posted notices purporting to disestablish the ERO (IEA R. 680–681; 388–389, 605–612). On October 4, 1944, the constitution and by-laws of the

[7] The record also shows that Harry Furbank, who was chosen president, had been representative of the ERO in 1935, and for five years preceding that he had served as a representative of the Congress, the illegal predecessor of the ERO (IEA R. 521, 65–68). Similarly, John Connors, vice-president of IEA, had served on the ERO Grievance Committee in 1944 (IEA R. 69, 521).

[8] The Board inadvertently misstated the date of this communication as September 5, 1944.

IEA, which had been previously prepared, were read at a meeting of the employees and adopted (IEA R. 687; 523).

On October 9, 1944, the IEA renewed its request for recognition (IEA R. 688; 593).[9] On October 12, a meeting was held attended by the representatives of the Company, the temporary officers of the IEA, and Koopman and others who had been prominently identified with the ERO. In the course of this meeting, the Company, after first refusing to do so, finally agreed to recognize the IEA upon proof of its majority status (IEA R. 688–689; 276–282, 389–392). Thereafter, on October 14, the IEA submitted membership cards and these were checked against the Company's payroll. On the basis of this check, it appeared that the IEA had been designated by a majority of the Company's employees and thereupon the Company recognized it as the exclusive bargaining agent of its employees (IEA R. 689; 316–317, 394, 543).

A week later, on October 21, the Board issued its decision and order adopting the trial examiner's recommendations with respect to the ERO (IEA R. 681; 471–473). The Company again posted notices stating that it was disestablishing the ERO and that it would no longer recognize it as the collective bargaining represent-

[9] The Board inadvertently misstated the date of this communication as October 5, 1944.

ative of its employees (IEA R. 681; 395–396, 613–618).

Prior to the recognition of the IEA, the International Molders and Foundry Workers of America, A. F. of L. (herein called the Molders) had requested that the Company recognize the Molders as the bargaining representative of the employees in the Company's foundry (IEA R. 687; 201–203). In contrast to the Company's action in recognizing the IEA merely on the basis of an informal check of its membership cards against the Company's payroll, the Company stated that it would not recognize the Molders unless it was first certified by the Board as the representative of the foundry workers (IEA R. 687; 203).

Following the Company's recognition of the IEA, bargaining negotiations were held which resulted in the execution of a collective bargaining agreement, effective January 1, 1945 (IEA R. 690; 172, 396–397). The contract, which was for one year's duration and automatically renewable thereafter from year to year unless notice to the contrary was given, included an exclusive recognition clause, provision for voluntary check-off of dues, and other clauses dealing with wages and hours of work (IEA R. 690; 575–591).

Upon the foregoing facts, the Board reaffirmed its earlier findings with respect to the Congress and the ERO and concluded (IEA R. 670–671,

679–681, 691–695) that in the light of (a) the Company's failure to disestablish the ERO prior to the formation of the IEA, particularly in view of the fact that the Company had from 1919 to 1944 dominated the organizational life of its employees, and (b) the initiation and sponsorship of the IEA by a group of ERO officers and representatives, a circumstance which strongly tended to suggest to the employees a substantial identity between the two organizations, the employees "would reasonably conclude 'that the company approved the new [i. e. the IEA] as it did the old' organization and that their choice was 'for that reason not as free as the statute demands' ". The Board also found (IEA R. 694–695, 670–671) that, in the circumstances related above, the Company's recognition of the IEA as the exclusive bargaining representative of its employees and the subsequent execution of a contract with it constituted unlawful assistance within the meaning of the Act. Upon these findings the Board ordered (IEA R. 673–674) the Company to cease and desist from its unfair labor practices, to withdraw recognition from and disestablish the IEA as collective bargaining representative of its employees and to post the usual notices. It also ordered the Company (IEA R. 673–674), in view of its persistent predilection for treating with organizations existing in violation of Section 8 (2) and (1) of the Act, as reflected in its past conduct, to cease and desist from recognizing or

dealing with any labor organization unless and until such labor organization shall have been first certified by the Board as collective bargaining representative of the employees.

On April 26 and May 4, 1946, the Company and the IEA filed in the court below separate petitions to review and set aside the Board's order (IEA R. 727–747). On June 4, 1946, the Board filed its answer and request for enforcement of its order (IEA R. 748–752). On November 29, 1946, the court below entered its opinion (IEA R. 753–773), one judge dissenting, in which it held, *inter alia,* that the Board's findings with respect to the IEA were supported by substantial evidence (IEA R. 763–770) and directed that the Board's order as modified in a manner not material here, be enforced (IEA R. 770–772). On December 20, 1946, the court entered its decree enforcing the Board's order, as modified (IEA R. 774–777).

ARGUMENT

A. NO. 906

1. The Company contends (Pet. 8–9) that the court below erred in enforcing the Board's order with respect to the Congress and the ERO because both prior to and after the issuance of the Board's order, it had voluntarily complied with the requirements of the order, thereby rendering enforcement proceedings moot. This contention is foreclosed by the settled decisions of this Court. *Consolidated Edison Co.* v. *National Labor Rela-*

tions Board, 305 U. S. 197, 230; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 271; *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 334; cf. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U. S. 257, 259–260.

2. The Company also asserts (Pet. 9–12) that the provision of the Board's order which restrains it from in any manner infringing the rights guaranteed to employees by Section 7 of the Act is invalid under *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, and *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376. However, the Company is precluded from raising this issue. *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U. S. 385; *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253. The trial examiner in the instant proceedings made the recommendation, which the Board adopted (*supra,* pp. 10–11), that the order contain a broad injunction.[10] The Company filed no exceptions to the intermediate report; indeed, it took steps purporting to comply with it (*supra,* p. 17).

[10] The Company's contention (Pet. 11) that the Board's order differs in this respect from the order proposed by the trial examiner and that it, therefore, had no opportunity to object to the order as finally entered by the Board, is insubstantial. As indicated above, pp. 10–11, the Board modified the recommended order by merely inserting therein the clause "* * * United Electrical, Radio and Machine Workers of America, affiliated with the C. I. O., or any other * * *".

3. Moreover, the Company's contention respecting the scope of the order is based upon a misinterpretation of the holdings in the *Express Publishing* and *May Department Stores* cases. This Court in the *May Department Stores* case, *supra,* 326 U. S. at 392, held that where an employer's conduct shows a persistent "attitude of opposition to the purposes of the Act to protect the rights of employees generally," the Board may guard against the threat of future varied attacks upon the employees' enjoyment of their rights under the Act, by incorporating in its order the broad cease and desist provision. Cf. *Express Publishing Co.* case, *supra,* at p. 437. That attitude, with its implicit threat of continued invasions of all of the rights guaranteed to employees under the Act, is found here. As the court below noted (ERO R. 478), the Company, as of the date of the Board's order, had uninterruptedly dominated every aspect of the organizational life of its employees for sixteen years prior to the passage of the Act and for an additional nine years following its enactment. This conduct was manifestly calculated to thwart all of the rights guaranteed to employees by Section 7 of the Act, that is to say, not only the "right to self-organization" but also the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other

mutual aid or protection". Hence, under the *May Department Stores* decision, the general cease and desist provision of the Board's order was properly enforced by the court below.

B. NOS. 905, 917

1. The Company (Pet. 17–20) and the IEA (Pet. 11–18) assert that the court below, in enforcing the Board's order with respect to the IEA, has misinterpreted the controlling decisions of this Court and improperly renounced its statutory authority to determine whether or not Board findings are supported by substantial evidence. These contentions are without merit.

An examination of the opinion of the court below will readily disclose that the court recognized that the principal question before it was whether the Board's decision rested upon substantial evidence (IEA R. 757); it reviewed in detail the Board's findings with respect to the IEA and expressly held that they were supported by substantial evidence (IEA R. 757–763). Summarizing these facts, the court stated (IEA R. 766–777):

> Thus, unquestionably, this employer, uninterruptedly, for some twenty-five years, dominated this two-named unions [i. e. the Congress and the ERO], and for the last nine of those years, from 1935 to 1944, did so unlawfully, in violation of § 8 of the Act. The pivotal issue for the Board was therefore whether this quarter of a century

of domination suddenly evaporated in 1944 with the creation of I. E. A. * * *

Prior to September 21, 1944—before which time the company had not in any way indicated a severance of its relations with its captive E. R. O.—these events had occurred: (1) A Committee consisting of E. R. O. officials and representatives organized I. E. A.; (2) this committee grew out of a committee which, a short time previously, had been appointed by the E. R. O. President; (3) this new committee collected I. E. A. initiation fees and paid them to the E. R. O. Secretary; (4) the E. R. O. President called a *special meeting of employees*; (5) the minutes of this meeting describe it as "the first meeting of the Independent Employees Association"; (6) Koopman, a prominent E. R. O. representative, presided at this "first meeting" of I. E. A.; (7) that same meeting elected as temporary officers of I. E. A. persons who had acted in official capacities in E. R. O. All this before the company took any steps to "disestablish" E. R. O. Moreover, subsequent to the first notice of "disestablishment" of E. R. O., the company refused to consider whether the Molders' union represented a majority of the molders in the company's employ, unless and until the Board certified that union; but, six days after this refusal, the company considered the majority status of I. E. A. without imposing a similar condition of Board certification.

The court then held that in view of the Company's failure to disestablish the ERO prior to the formation of the IEA in order to dissipate the effects of its long-continued domination of the employees' organizational life, the important role played by ERO officers in the formation and initial stages of the IEA, and the Company's show of favoritism for the IEA, the Board's ultimate conclusion that the IEA was a company-dominated labor organization in violation of the Act was a rational inference of fact and therefore conclusive (IEA R. 764–768).

This holding fully comports with the decisions of this Court. First, as was said in *National Labor Relations Board* v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50, 60,

> * * * the question of the weight to be given the passage of time or subsequent efforts to dissipate the effect of this early domination is for the Board. Its conclusion is an inference of fact which may not be set aside upon judicial review because the courts would have drawn a different inference.

Second, where, as here, a labor organization is initiated and sponsored by the officers and representatives of an employer-dominated labor organization, which immediately precedes in point of time the new organization, and the employer has failed, prior to the formation of the successor organization, to take adequate, timely steps to dis-

establish the illegal predecessor and, thereafter, evidences some favoritism for the successor organization, the Board may, as it did here, properly conclude upon the basis of all these circumstances that the new organization is company-dominated and order its disestablishment. *National Labor Relations Board* v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50, 56–60; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming *per curiam*, 112 F. (2d) 657, 660–661 (C. C. A. 2); *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596–600. Nor is the Board precluded from reaching such a conclusion because the record may, as here, contain evidence indicating that the employees have expressed a preference for the successor organization, that the more patently illegal indicia of employer domination do not exist, and that the bargaining history of the successor organization has been aggressive and militant. This Court has repeatedly held that the Board may, as here, decline to give evidence of this character conclusive weight where the record contains countervailing evidence of employer-domination. *Southern Bell* case, at p. 60; *Link-Belt* case at pp. 587–588; *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 534; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 248–249; *Na-*

tional Labor Relations Board v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, reversing, 116 F. (2d) 350, 355 (C. C. A. 7).

2. Since the decision of this Court in *National Labor Relations Board* v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50, all of the Circuit Courts of Appeals, except that for the Seventh Circuit, which have considered problems arising from a successor to a company-dominated union, have sustained the Board. Thus, all the cases cited by the Company (Pet. 9–10, 13–16) and the IEA (Pet. 11–18) as in conflict with the decision below, except the cases in the Seventh Circuit and one case in the Fourth Circuit which has since been superseded,[11] arose prior to the decision of this Court in the *Southern Bell Telephone* case. As was stated in the petition for certiorari in *National Labor Relations Board* v. *Keystone Steel & Wire Co., et al.*, No. 544, this Term, certiorari granted November 12, 1946, the Circuit Court of Appeals for the Seventh Circuit is alone in refusing to accept the Board's judgment in dealing with this type of factual question. The body of judicial authority with which the *Keystone* case is in conflict is now in-

[11] If it can be said that *National Labor Relations Board* v. *Clinchfield Coal Corp.*, 145 F. (2d) 66 (C. C. A. 4) (cited IEA Pet. 12, 17), is in conflict, the more recent decision in *Western Electric Co.* v. *National Labor Relations Board*, 147 F. (2d) 519 (C. C. A. 4), certiorari denied, 324 U. S. 870, places the Fourth Circuit in accord with the court below.

creased to include the decision below in the present case.

3. The Company asserts (Pet. 20–22) that the court below improperly enforced that portion of the Board's order enjoining the Company from recognizing or dealing with any other labor organization as the representative of its employees for purposes of collective bargaining unless and until such labor organization shall have been certified by the Board as such representative.

We submit that in the light of the Company's persistent predilection, as fully established by its course of conduct extending over a period of many years, for treating with organizations existing in violation of the Act, and thereby thwarting its employees' attempts at self-organization for collective bargaining, the order represents a proper exercise of the broad discretion, which this Court has repeatedly stated is lodged in the Board, to fashion remedial measures necessary to expunge the effects of unfair labor practices similar to those found by the Board to have been committed by the employer in the past. See *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 390.[12]

[12] The Circuit Court of Appeals for the Third Circuit, upon a showing in a contempt proceeding that an employer,

Whether or not, as the Company argues (Pet. 21), compliance with the Board's order may result in a "serious conflict" with the wishes of its employees cannot be ascertained until the employees are freed from the compulsions inherent in the long continued domination of their bargaining relationship by the Company. Also without substance is the Company's further contention (Pet. 21) that the order will have the effect of suspending for a time, contrary to the purely literal requirements of the Act, collective bargaining between it and its employees. The Board, with the approval of this and other courts, has frequently balanced conflicting objectives of the Act and arrived at an accommodation between them which insures the practical operation of the Act and the achievement of its objectives. The order here represents such an accommodation. See e. g., *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 797–798; *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702, 705–706; *National Labor Relations Board* v. *Century Oxford Mfg. Corp.,*

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previously found to have dominated a labor organization, had engaged in similar misconduct with respect to a successor organization, entered an order, at the Board's request, similar to the instant one. The order enjoined the employer for a period of one year from recognizing any labor organization not certified by the Board. *National Labor Relations Board* v. *Jersey Maid Corp.* (entered May 2, 1941; unreported). There are no contrary decisions. See also *Matter of The Tappan Stove Co.*, 66 N. L. R. B. 759, 765–766.

140 F. (2d) 541, 542 (C. C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. (2d) 217, 221–222 (C. C. A. 4).

The further contention of the Company (Pet. 21) and the IEA (Pet. 20) that this provision of the order, in effect, prohibits it from bargaining with any but a nationally affiliated union, although its employees prefer to be represented by an unaffiliated union, and thereby infringes upon the employees' right to select a bargaining representative of their own choice, is without merit. Nothing in the order prevents the employees from designating, under the procedures of the Act, an unaffiliated organization, if it is truly free. The Board has in numerous instances entertained petitions for certification of representatives filed by unaffiliated unions and conducted elections where such unions were on the ballot and, upon receiving a majority of the votes cast, were certified as the bargaining agent.[18]

4. The IEA urges (Pet. 18) that the limitation which the court below assertedly placed on its reviewing powers under the Act is "out of harmony" with the Federal Administrative Procedure Act of 1946 (c. 324, Public Law 404, 79th Cong., 2d sess.). We have already indicated (*supra*, pp. 24–26) that the court exercised its

[18] National Labor Relations Board, *Tenth Annual Report* (Gov't Printing Office, 1945), pp. 10, 86, 87.

reviewing powers in a manner wholly consistent with the National Labor Relations Act and the decisions of this Court. Furthermore, the Administrative Procedure Act, as pointed out by the Government in its Brief (pp. 45–57) in *United States* v. *Joseph Ruzicka et al.*, No. 54, this Term, to which we respectfully refer the Court, is not applicable to the instant proceedings because they were pending prior to the enactment of this Act. Moreover this Act, if applicable to the instant proceedings, does not require a different conclusion than the one reached here by the court below.

5. The IEA asserts (Pet. 20) that the Board's order requiring the Company completely to disestablish the IEA as the bargaining representative of the employees constituted an arbitrary and unwarranted abuse of discretion on the part of the Board because it is "in effect an order of dissolution inasmuch as the Board has made it a firm policy never to certify a disestablished union." The authority of the Board in this respect is firmly established. *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453.

CONCLUSION

The decision of the court below is, in our judgment, entirely consistent in all respects with principles previously announced by this Court. However, in view of the pendency of *National Labor Relations Board* v. *Keystone Steel & Wire Company, et al.*, No. 544, this Term, certiorari

granted, November 12, 1946, which is in conflict with the decisions of the other circuit courts of appeals (including the court below) which have dealt with the question of the conclusiveness of the Board's findings as to company-domination of successor unions, this Court may deem it appropriate to defer action upon the present petitions pending consideration and decision of the *Keystone* case.

GEORGE T. WASHINGTON,
Acting Solicitor General.

GERHARD P. VAN ARKEL,
General Counsel.

MORRIS P. GLUSHIEN,
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FEBRUARY 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * *

SEC. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue

and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred. * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 19

NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 20

NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD

Petitioner, Neptune Meter Company, hereinafter called the Company, has filed a supplemental brief in support of its petitions for certiorari in Nos. 19 and 20, October Term, 1947, formerly Nos. 905 and 906, October Term, 1946. This supplemental brief is based on the enactment, after the petitions were filed, of the Labor Management Relations Act of 1947 (Public Law 101,

80th Cong., 1st Sess., Ch. 120) amending the National Labor Relations Act.

1. The Company urges (Supp. Br. 2–5) that these cases be remanded to the Board for further proceedings not inconsistent with the provisions of the Labor Management Relations Act. This request is based upon the argument that the Board's orders involved here requiring the Company to disestablish completely the two labor organizations found by the Board to be company-dominated and supported would neither be issued by the Board nor enforced by a reviewing court today because of an amendment to Section 10 (c) of the National Labor Relations Act effected by the Labor Management Relations Act.

Section 10 (c) of the National Labor Relations Act, as amended, provides "That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." Section 9 (c) (2) of the Act as amended, provides that "in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c)." The legislative history of these amendments indicates

that their purpose was to require the Board to accord equal treatment to affiliated and nonaffiliated unions in considering charges that such unions are employer-dominated or assisted and in determining the appropriate remedy for eliminating such domination or assistance.[1]

Under the National Labor Relations Act, prior to these amendments, the Board normally ordered an employer to disestablish an unaffiliated labor organization which it found to be employer-dominated.[2] In the case of an affiliated union found to be employer-dominated, the Board normally did not order the offending employer completely and permanently to disestablish it but directed him to cease recognizing it until certified by the Board.[3] The amendments contained in the Labor Management Relations Act do not, of course, preclude the Board from entering dis-

[1] House Report 510, 80th Cong., 1st Sess., pp. 54–55; Senate Report No. 105, 80th Cong., 1st Sess., pp. 12–13.

[2] E. g., *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453; *National Labor Relations Board* v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50.

[3] E. g., *Matter of National Motor Bearing Co.*, 5 N. L. R. B. 409, 416–425, 441, enforced as modified, *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652 (C. C. A. 9); *Matter of Eagle-Picher Mining & Smelting Co.*, 16 N. L. R. B. 727, 766–775, 831–832, 868–874, enforced as modified, *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. (2d) 903 (C. C. A. 8); *Matter of Cowell Portland Cement Co.*, 40 N. L. R. B. 652, enforced as modified, *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 148 F. (2d) 237 (C. C. A. 9), certiorari denied, 326 U. S. 735.

establishment orders in the future with respect to labor organizations, whether affiliated or nonaffiliated, found to be employer-dominated or assisted. They only mean that the Board cannot in the future continue to order employers to disestablish unaffiliated labor organizations found to be employer-dominated or supported unless the Board requires similar action on the part of employers with respect to affiliated unions also found to be employer-dominated or supported.

The amendments were clearly aimed only at this disparity of remedies applied by the Board to affiliated and nonaffiliated organizations and not to the nature of the disestablishment remedy. None of the amendments made by Congress and none of the legislative history reveals a Congressional intent to prohibit the Board's use of the disestablishment remedy. The committee reports,[4] as well as Senator Taft's statement and

[4] S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., p. 3, in summarizing the major amendments effected by the bill states: "It prevents the Board from continuing to accord affiliated unions special advantages at the expense of independent labor organizations, by requiring that, under identical circumstances, the Board in complaint cases refrain from any disparity of treatment." See also pp. 12–13 of the same report. The Conference Report, H. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., pp. 54–55, states: "In the past the Board has made findings of violation of Section 8 (2) in cases involving independent unions, committees and representation plans upon much weaker evidence than it has required in cases involving affiliated unions, and it has ordered employers to take far more drastic action with respect to independent organizations than with respect to affiliated organizations.

analysis of the bill,[5] emphasize that the only objective of the amendments was to end "disparate treatment" of affiliated and nonaffiliated organizations. Sponsors of the amendments repeatedly denied that their effect would be to weaken the remedies heretofore used by the Board to ban company-dominated unions.[6]

The conference agreement adopts the language of the Senate amendment, which requires equal treatment for both affiliated and nonaffiliated organizations."

[5] Senator Taft stated: "* * * In the opinion of the Senate conferees the language of the Senate amendment which prevents the Board from continuing the present disparity of treatment with respect to independent unions was sufficient to accomplish the result now expressly spelled out by the conference agreement. Since the House conferees expressed some doubt on this question, however, the Senate conferees agreed to the insertion of this language" (Cong. Rec., June 5, 1947, p. 6601).

[6] Senator Ball stated: "All the bill provides is that in considering charges of company domination the N. L. R. B. shall treat independent unions and affiliated unions in exactly the same way. I cannot see that that requires them to put a company-dominated union on the ballot. It merely says they shall treat A. F. L. unions and so-called independent unions in exactly the same way. * * * All the bill, as it came from the committee, says is that in considering unfair-labor-practice charges, under section 8 (a) (2), that the company is dominating the union, they shall treat all unions alike, regardless of whether they are affiliated with an international union or not. If that is requiring the Board to place a company-dominated union on the ballot, I do not understand the English language. I do not think it does that" (93 Cong. Rec. 4030). "All the bill does is to require the N. L. R. B. in considering the charges, under section 8 (a) (1) or (2), of company domination or interference with a union, to treat affiliated and nonaffiliated independent unions exactly the same. If the Senator wants to defend the present practice of having one rule for affiliated unions and a completely

The Board has not had occasion as yet to consider the application and scope of the "equal treatment" provisions. It now has cases pending before it which will necessitate consideration of these provisions. Decisions in these cases will be handed down in the near future, and if this case has not yet been disposed of by the Court, the Board will supply the Court with copies of these decisions as they issue.

Since the amendments to the Act do not preclude the Board from entering the same order in the future as that presented in this case in just the same circumstances as are here present, petitioner's contention that the amendments require a vacation of the decree below is without merit.[7]

2. But even if the amendments did change the law in any respect material to violations of Section 8 (a) (2) and to disestablishment orders, still they

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different rule for independent unions, then he may do so. But do not try to make the statement that the bill encourages company unions. It leaves the provisions of section 8 (a) (1) and (2) exactly as they are now" (93 Cong. Rec. 4196). Senator Smith stated: "Under the bill, if the union continues to be company-dominated it is not eligible to be placed on the ballot. All we are doing here is to protect independent unions. If they can prove that they are independent unions they are entitled to be placed on the ballot. It is distinctly provided in the bill that if unions are company-dominated they are not eligible" (93 Cong. Rec. 4283).

[7] The stipulation in *National Labor Relations Board* v. *Keystone Steel & Wire Co.*, No. 9, this Term, to which the Company refers (Supp. Br. 5), was entered into by the Board primarily because of factual considerations peculiar to that case and not because of the change made by the amendments.

are not retroactive and would have no effect on the present case. The Labor Management Relations Act was enacted on June 23, 1947, and became effective on August 22, 1947. The Board's orders in Nos. 19 and 20, October Term, 1947, directing the Company to disestablish the two labor organizations were handed down on March 6, 1946, and October 21, 1944, respectively (IEA R. 670–700; ERO R. 1–24).[8] The decrees of the court below enforcing the orders of the Board were entered on December 20, 1946 (ERO R. 486–487; IEA R. 774–777). Thus, prior to the passage or effective date of the Labor Management Relations Act, the Company, by virtue of the National Labor Relations Act, was under an obligation to disestablish the two labor organizations involved here and thereby restore to its employees their freedom to organize for purposes of collective bargaining. The Board's orders and the decrees of the court below enforce this obligation. The passage of the Labor Management Relations Act after this obligation had come into existence cannot serve to absolve the Company of its duty to discharge that obligation. The Federal savings statute provides that the repeal or amendment of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing or

[8] For convenience, references to the record in No. 20 are designated "(ERO R. —)," references to the record in Nos. 19 and 22 are designated "(IEA R. —)."

amending act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. 1 U. S. C. 29. The term "liability" as used in this statute has been broadly construed by this and other courts to comprehend all obligations arising out of any breach of a statutory duty.[9] The obligation of an employer to disestablish an employer-dominated union is, we submit, a "liability" within the meaning of the general savings statute. Hence, under the terms of that statute that obligation continues to be binding upon the Company, notwithstanding the subsequent passage of the Labor Management Relations Act unless Congress had manifested therein an intention to extinguish such liability.[10] The Labor Management Relations Act

[9] E. g. *United States* v. *Reisinger*, 128 U. S. 398; *Hertz* v. *Woodman*, 218 U. S. 205; *United States* v. *U. S. Industrial Alcohol Co.*, 8 F. Supp. 179, 181–183 (D. Md.); *United States* v. *Four Cases of Lastings*, Fed. Cas. No. 15,145 (D. C. S. D. N. Y.); *Tinker* v. *Van Dyke*, Fed. Cas. No. 14,058 (C. C. E. D. Mich.); *Warren* v. *Garber*, Fed. Cas. No. 17,196 (C. C. E. D. Va.); *DeFour* v. *United States*, 260 Fed. 596, 599 (C. C. A. 9); certiorari denied, 253 U. S. 487; *Goublin* v. *United States*, 261 Fed. 5 (C. C. A. 9); *Lang* v. *United States*, 133 Fed. 201 (C. C. A. 7); *United States* v. *Krupnick*, 51 F. Supp. 982, 989 (D. N. J.); *United States* v. *Auerbach*, 68 F. Supp. 776, 778–779 (S. D. Calif.)

[10] See *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 465; *United States* v. *Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. 84, 93–94 (D. Minn.), affirmed 162 Fed. 835 (C. C. A. 8), certiorari denied, 212 U. S. 579; *Maceo* v. *United States*, 46 F. (2d) 788, 789 (C. C. A. 5); *Edgmon* v. *United States*, 87 F. (2d) 13 (C. C. A. 10).

contains no provision for relieving an employer from any liability arising out of any unfair labor practices committed prior to the passage of the Labor Management Relations Act. The United States Circuit Court of Appeals for the Eighth Circuit has recently held that the obligation of an employer to remedy unfair labor practices committed prior to the enactment of the amendments to the National Labor Relations Act is a liability preserved by 1 U. S. C. 29, *National Labor Relations Board* v. *National Garment Co.*, decided January 7, 1948.

The authorities cited by the Company (Supp. Br. 8–9) to the effect that "this Court will consider changes in the law occurring while cases are pending on appeal" are not controlling. In the cases cited either there was no general savings statute to preserve liabilities incurred under the original statute or they involved rules governing future conduct. The general savings statute does not apply to orders which do not enforce liabilities but merely lay down rules for future conduct. Here the Company has unlawfully dominated and supported the two labor organizations involved. By reason of that conduct, the Company came under an obligation to take appropriate action repudiating them as the bargaining representative of its employees, wipe the slate clean, and thereby free them from the compulsions flowing from its long-continued domination of their organ-

izational life.[11] Such an obligation, we believe, does not lay down merely a rule for future conduct; it calls for the redress of past unfair labor practices and is, therefore, a liability within the meaning of the savings statute. For these reasons there is no warrant for remanding these cases to the Board as requested by the Company.

3. The Company also argues (Supp. Br. 6–7) that the Labor Management Relations Act broadens the permissible scope of judicial review of Board findings of fact and that the court below should therefore now be directed to reconsider the Board's findings of fact in the instant proceedings and determine the validity of these findings upon the basis of the standard of review laid down in the Labor Management Relations Act. This contention is without merit.

Section 10 (e) and (f) of the National Labor Relations Act provided, *inter alia,* that upon petition to the appropriate circuit court of appeals to enforce or set aside a Board order "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." Sections 10 (e) and (f) of the National Labor Relations Act were amended by the Labor Management Relations Act by substituting for the provision that Board findings "as to facts, if supported by evidence, shall be conclusive" the provision that such find-

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[11] *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 459–461; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250.

ings "with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The only court which has thus far explicitly ruled upon the effect of this amendment has held that Congress did not thereby materially change the standard of review. *National Labor Relations Board* v. *Austin Co.*, 21 L. R. R. M. 2132, 2134 (C. C. A. 7, decided December 19, 1947). In that case the court found that, while Congress undoubtedly intended that the scope of judicial review be broadened,[12] the language employed by it "impelled the conclusion that, in effect, the scope of our review under the new Act is only immaterially changed from the scope of our review under the National Labor Relations Act."

In any event, the opinion of the court below shows that it gave full and careful consideration to the whole record in the case (ERO R. 465–485; IEA R. 753–773). Indeed, the court expressly stated that if in the instant case "the crucial issue (i. e., whether the company had taken sufficient steps to disabuse the employees' minds of the belief that in 1944 they were still subject to unlawful employer-domination) had been left to a jury, and if the jury had returned a general verdict against the company, we would not, on the evidence in this record, dream of disturbing the

[12] See Sen. Rep. No. 105, 80th Cong., 1st Sess., note 7, p. 56, and p. 27.

jury's verdict" (ERO R. 479, IEA R. 767). Since the court has already held that the record would sustain a jury verdict, a remand to consider if the record as a whole sustains the Board's findings would be entirely useless procedure.

However, even assuming for purposes of argument that the Labor Management Relations Act establishes a different standard of judicial review of Board orders with respect to the requisite evidentiary support necessary to entitle them to enforcement, such a change cannot affect the validity of a decision made prior to the change in reviewing standards and in conformity with the standards of judicial review operative when the decision was rendered. As already stated, the Labor Management Relations Act became effective by its own terms on August 22, 1947. The opinion of the court below in the instant proceedings was handed down on November 26, 1946 (ERO R. 465–485; IEA R. 753–757). The decrees enforcing the Board's order were entered in the court below on December 20, 1946, or eight months prior to the effective date of the Labor Management Relations Act. The court below applied the standard of judicial review of Board orders set forth in the then operative provisions of the National Labor Relations Act, found that the Board's orders in the instant proceedings were supported by substantial evidence within the meaning of Section 10 (e) and (f) of the National Labor Relations Act, and

accordingly ordered them enforced. It is a general rule that legislative changes with respect to procedural rules or rules of evidence cannot, in the absence of a manifest legislative intent to the contrary, be relied on "to reach backward, and nullify by relation the things already done." *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261, 130 N. E. 288, 290. Accord: *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 169–170; *Salt Lake Coffee & Spice Co.* v. *District Court*, 44 Utah 411, 140 Pac. 666, 668–669; see 2 Sutherland, *Statutory Construction*, § 2212 (3d ed. 1943). See also *Woodvine* v. *Dean*, 194 Mass. 40, 79 N. E. 882, 883; *In re Patterson's Estate*, 155 Cal 626, 102 Pac. 941, 945.[13]

CONCLUSION

The decision of the court below is correct, and entirely in accord with the rulings of this Court. The petitions for certiorari should therefore be denied.[14]

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[13] Cf. Rule 86 of the Federal Rules of Civil Procedure (28 U. S. C. 723c) which provides that the new rules shall govern "all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies." The rule has been construed as requiring that procedural steps taken prior to the effective date of the new Rules be tested under the rules in effect at the time such steps were taken. *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 169–170; *Hawkinson* v. *Carnell & Bradburn*, 26 F. Supp. 150, (E. D. Pa.); *Dolcater* v. *Manufacturers*

Respectfully submitted.

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JANUARY 1948.

& Traders Trust Co., 25 F. Supp. 637, 640 (W. D. N. Y.).

[14] In its original memorandum, dated February 1947, the Board suggested that, in view of the conflict with *National Labor Relations Board* v. *Keystone Steel & Wire Company, et al.*, which was then pending on certiorari, No. 544, Oct. Term 1946, this Court might deem it appropriate to defer action upon the present petitions pending disposition of the *Keystone* case. In view of the stipulation entered into by the parties in the latter case, and the action of this Court on December 8, 1947, in remanding the case to the Circuit Court of Appeals, there would no longer appear to be any reason for either granting the present petitions or postponing action upon them.

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